NO. 76-5416

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

~~BRIEF OF THE PETITIONER~~

WALTER L. GERASH, P.C.
Suite 2317, 1700 Broadway
Denver, CO 80202
(303) 222-8574

ATTORNEY FOR PETITIONER

September, 1976

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE PETITIONER

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Ruby Jones, hereby petitions for a Writ of Certiorari to review the decision of the Supreme Court of the State of Colorado affirming the judgment of the trial court and ruling that the Colorado measure of damages governs a case brought in state court pursuant to 42 U.S.C. §1983.

OPINION BELOW

The opinion of the Colorado Supreme Court is not yet reported either officially or unofficially. However, a copy of the Slip Opinion and the Order denying Petitioner's Motion for Rehearing are appended hereto as Appendices "A" and "B". The opinion was issued May 24, 1976, Chief Justice Pringle and Justice Groves dissenting, Justice Kelly not participating.

JURISDICTION

The decision sought to be reviewed was made and entered on May 24, 1976, and a timely Motion for Rehearing was denied on June 21, 1976. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

Where the black mother of a 15-year-old child who was intentionally shot and killed by a white policeman acting under the color of state law brings a suit in state court pursuant to 42 U.S.C. §1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U.S.C. §1983?

Same as stated in Brief B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Article VI, Section (2), provides:

   This constitution, and the laws of the United States which shall be made in pursuance thereof #. . .# shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the constitutions or laws of any state notwithstanding.

2. U.S. Const., Amend. XIV, provides in part:

   * * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *

3. 42 U.S.C. §1983, states:

   Civil action for deprivation of rights
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (R.S. §1979).

4. 42 U.S.C. §1988, states:

   Proceedings in vindication of civil rights
   The jurisdiction in civil and criminal matters conferred on the district courts by the provisions

> of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
> (R.S. §722).

5. Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203 (See Appendix "C").

STATEMENT OF THE CASE

In October 1973, Plaintiff, Ruby Jones, filed a Complaint in the District Court of the City and County of Denver, State of Colorado, against Douglas Hildebrant, Brian Moran, and the City and County of Denver. Moran was subsequently dismissed from the suit. Plaintiff's Complaint, which, as amended, alleged battery, negligence, and deprivation of civil rights under 42 U.S.C. §1983, stated that Douglas Hildebrant, a white police officer employed by the City and County of Denver, intentionally shot and killed her unarmed black son, Larry, while acting under the color of state law. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

The Defendants admitted the shooting but asserted that it was justified on the grounds that Larry Jones was a fleeing felon, that Officer Hildebrant acted in self defense, and that he used no more force than he reasonably believed to be necessary.

At trial, after both sides had rested, the Defendants moved to dismiss the Plaintiff's civil rights claim. In granting the Defendants' Motion, the Court ruled that the Colorado

measure of damages controlled all three of the Plaintiff's claims. Consequently, it held that the civil rights claim merged with the other claims and refused to instruct the jury on the civil rights claim. The jury rejected the Defendants' contentions and found for the Plaintiff, but returned a verdict in her favor of only $1,500. From this verdict, the Plaintiff appealed.

The judicial issues were raised both in the trial court at the Motion to Dismiss and in the Colorado Supreme Court; the Colorado Supreme Court holding that the state law with respect to wrongful death controlled the damages available to the Plaintiff under 42 U.S.C. §1983. That the constitutional question was considered is demonstrated by the dissenting opinion of Chief Justice Pringle in which Justice Groves joined:

> "I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. §1983 (1970)." [Slip Opinion, at p. 16].

REASONS WHY CERTIORARI SHOULD BE GRANTED

Beginning with Monroe v. Pape, 365 U.S. 167 (1961), this Court has emphasized the feasibility of bringing actions pursuant to 42 U.S.C. §1983 to protect and compensate victims whose civil rights have been abused. In Scheur v. Rhodes, 416 U.S. 232 (1974), this Court extended that doctrine to cases where the unlawful act caused death. This Court has never, however, broached the question of the measure of damages applicable where the tort results in death. The instant case provides an ideal vehicle with which to fill this void.

The case is the sort clearly envisioned by the Congress when it passed the civil rights acts. Larry Jones, an unarmed black teenager, was shot in the back of the head by a white police officer who acted intentionally and under the color

of state law. It is hard to imagine a more wanton act. Yet, because Colorado adheres to the archaic net pecuniary loss rule which severely restricts the measure of damages in wrongful death actions, Petitioner has been effectively denied a remedy. It is Petitioner's contention, as argued more fully below, that the intent behind the civil rights acts was to provide a federal remedy where federal rights have been impaired. Should this Court refuse to grant certiorari, the mother of a teenage boy shot by a policeman will be "compensated" by only $1,500.

In short, the issue presented by this case has never been considered by this Court. Additionally, this case presents an ideal fact situation for consideration of that issue. The wanton shooting of a black child is an obvious deprivation of a civil right. Finally, the issue is well defined; there are no collateral issues which would prevent this Court from fully considering the merits of the case. It is for these reasons that the Petitioner respectfully requests this Court to issue a Writ of Certiorari.

ARGUMENT

THE STATE MEASURE OF DAMAGES DOES NOT CONTROL AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983 WHERE THE TORT RESULTED IN DEATH.

While it is well established that the parents of a child wrongfully killed by one acting under color of law may bring suit pursuant to 42 U.S.C. §1983, Scheur v. Rhodes, supra, this Court has never stated what the measure of damages in such an action should be. The Colorado Supreme Court ruled that "Colorado's wrongful death remedy would be engrafted into a §1983 action. . . ." (Slip Opinion, p. 11). It also ruled:

> "Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply." (Slip Opinion, p. 12).

These excerpts of the Court's opinion show the fallacy of the decision. Federal law provides no statute indicating who is a proper plaintiff to bring an action pursuant to 42 U.S.C. §1983 where the tort results in the death of the victim. Hence, courts in the absence of federal law have looked to state law to determine standing. See, e.g., Mattis v. Schnarr, 502 F.2d 588 (8th Cir., 1974); Brazier v. Cherry, 293 F.2d 401 (5th Cir., 1961). It is clear that under Colorado law, Ruby Jones had standing to bring this lawsuit. Colo. Rev. Stat. Ann. §§13-21-201, 13-21-202 (1973).

In contrast to the void in the federal law on standing, there is a federal common law of damages and a federal statute, 42 U.S.C. §1988, governing the measure of damages in actions brought pursuant to 42 U.S.C. §1983. For example, in Bastista v. Weir, 340 F.2d 74 (3d Cir., 1965), the plaintiff brought suit against two policemen and the chief of police, Weir, pursuant to 42 U.S.C. §1983. The jury returned a verdict against one of the policemen, which verdict was upheld by the Third Circuit. The Court stated:

> "We are of the opinion, as we have stated, that the federal common law of damages command the issue of damages in the case at bar." (Id. at 87; accord, Caperci v. Huntoon, 397 F.2d 799 (1st Cir., 1968)).

Similarly, in Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court stated:

> "Compensatory damages for deprivation of a federal right are governed by federal standards as provided by congress in 42 U.S.C. §1988. . ." (Id. at 239).

The Court continued:

> "This means as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in federal statutes. cf. Brazier v. Cherry, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." (Id. at 240).

The rule that the federal and not the state measure of damages controls the instant case is consistent with the congressional intent in passing the civil rights acts. In Monroe v. Pape, supra, this Court noted that there were three purposes behind the civil rights acts. One of these was to provide "a remedy where state law was inadequate." (Id. at 1973).

In his concurring opinion in Monroe, Justice Harlan emphasized this point stating:

> "There will be many cases in which the relief provided by the state to the victim of a use of state power will be far less than what congress may have thought would be fair reimbursement for deprivation of a constitutional right." (Id. at 196, n. 5).

Thus, both the case law and the congressional intent indicate that federal law controls the measure of damages in an action brought under 42 U.S.C. §1983.

Additionally, it is clear that when Congress enacted 42 U.S.C. §1983, it intended the statute to apply to cases in which the tortfeasor caused a death. In Monroe, the court quoted Senator Lowe of Kansas, who stated:

> "'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been vested upon unoffending American citizens, the local administrations have been found inadequate to apply the proper corrective. * * *'"

The instant case presents precisely the situation foreseen by the court in Monroe. Colorado has one of the strictest rules of damages imaginable in wrongful death actions. Damages are limited to the net pecuniary loss (i.e., the financial loss) sustained by the Plaintiff as a result of the death. Where the victim is a child, this frequently means that the only recovery is funeral expenses. See, e.g., Kogul v. Sonheim, 150 Colo. 316, 372 P.2d 731 (1962); Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1961). Not only are damages limited by the pecuniary net loss rule, but with certain exceptions inapplicable to the case at bar, recovery is limited

to $45,000. Colo. Rev. Stat. Ann. §13-21-203 (1973). Moreover, Colorado does not permit exemplary damages in wrongful death cases. Moffat v. Tenney, 17 Colo. 189, 30 P.348 (1892). Finally, Colorado provides no compensation for the loss of a civil right.

The federal rule is not as restrictive. There is no case in which the federal courts, as a matter of federal law, have applied the restrictive pecuniary net loss rule. There is no federal limitation on the amount of damages which can be recovered under 42 U.S.C. §1988. Exemplary damages have often been awarded as a result of actions brought pursuant to 42 U.S.C. §1983. See generally, 14 A.L.R. 2d 608 (1973).

Critical to the Colorado Supreme Court's ruling is that the measure of damages under 42 U.S.C. §1988 and under state law are identical. This ignores the fact that under federal law the loss of a civil right is itself compensable, even though it is not a pecuniary loss. In Rhoads v. Horvat, 270 F.Supp. 307, (D. Colo., 1967), the Court held:

> "In the eyes of the law, this right to vote is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury because each member of the jury has personal knowledge of the value of the right." (Id. at 309).

Similarly, in Farber v. Rizzo, 363 F.Supp. 386 (E.D. Pa., 1973), the Plaintiff brought a civil rights action against the police for interfering with his First Amendment right to leaflet at a speech being given by President Nixon. The Court held:

> ". . . Courts may award compensatory damages to plaintiffs who are deprived of constitutional rights. [Citations omitted] The value of such rights, while difficult of assessment, must be considered great." (Id. at 398).

Ruby Jones was clearly entitled to be compensated for the loss of her civil right. Yet under the decision of the Colorado Supreme Court, this has become impossible.

CONCLUSION

One of the purposes of passing the civil rights acts was to provide a federal remedy where state remedies were inadequate. This applied to actions which resulted in death. In the case at bar, the state remedy is clearly inadequate; given the realities of litigation, Ruby Jones will never see one penny of the $1,500 the jury awarded her. Even if she were to receive the entire amount, it would do little more than cover the costs of burying her son. Conversely, in the instant case. the federal measure of damages provides for non-pecuniary damages, exemplary damages, damages for the deprivation of a civil right, and has no statutory maximum.

Officer Hildebrant subjected himself to federal law when he shot Larry Jones, yet the Colorado Supreme Court has limited that federal statute by shackling it with the Colorado measure of damages. In so doing, the Colorado court violated Article VI of the United States Constitution, which provides that the federal law shall be the supreme law of the land. Consequently, the Petitioner respectfully asks this Court to issue a Writ of Certiorari to the Colorado Supreme Court.

WALTER L. GERASH, P.C.
Suite 2317, 1700 Broadway
Denver, CO 80202
(303) 222-8574
ATTORNEY FOR PETITIONER

APPENDIX "A"

NO. 26828

RUBY JONES,

Plaintiff-Appellant,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a Municipal Corporation,

Defendants-Appellees.

Appeal from the District Court of the City & County of Denver

Hon. Charles Goldberg, Judge

EN BANC — JUDGMENT AFFIRMED

Walter L. Gerash,

Attorney for Plaintiff-Appellant.

Wesley H. Doan,
Joseph A. Davies,

Attorneys for Defendants-Appellees.

MR. JUSTICE HODGES delivered the Opinion of the Court.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a $1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13-21-202, C.R.S. 1973. The third claim was premised on 42 U.S.C. §1983. It will be referred to as the §1983 claim in this opinion. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that

the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the §1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of $45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,[1] the jury returned a verdict of $1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue

---

[1] In accordance with our ruling in Herbertson v. Russel, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expenses she would have incurred in maintaining him.

of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

Plaintiff-appellant asserts that this court erred in Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights under Colo. Const. Art. II, §25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. See, e.g., Kogul v. Sonheim, 150 Colo. 316,

372 P.2d 731 (1962); Herbertson v. Russel, 150 Colo. 110, 371 P.2d 422 (1962); Denver & R.G.R.R. v. Spencer, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in Herbertson that

> "[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction...."

Also, in Kogul, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits

of industry and disposition to help her. Based on our review of this record, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." See Kogul v. Sonheim, supra.

The evidence of plaintiff's damages was vague and insubstantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her $30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately $1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,[2] and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

III.

Plaintiff-appellant next contends that her §1983 claim should not have been dismissed because it

---

[2] Compare Kogul v. Sonheim, supra, in which this court upheld an award for $700 for the wrongful death of a three-year old child.

would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

The United States Supreme Court in Paul v. Davis, _____U.S._____, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous §1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act

of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

> "In each of these cases [e.g., the suspension of a driver's license], as a result of the state action complained of, a right or status previously recognized by state lawwas distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the state's laws."

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily

guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.[3]

Secondly, the plaintiff argues that although §1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. §1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that §1988 permits the incorporation of the states' non-abatement statutes[4]

---

3 Accord, Jones v. Murphy, 392 F. Supp. 641 (E.D. Ala. 1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

4 The following courts have held that §1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Troutman v. Johnson City, 392 F.Supp. 556 (E.D. Tenn. 1973); Javits v. Stevens, 382 F.Supp. 131 (S.D. N.Y. 1974). See also Annot., 88 A.L.R. 2d 1153.

and wrongful death statutes[5] into §1983 actions in order to effectually implement the policies of that legislation.[6] For example, the leading case, Brazier v. Cherry, supra, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would cripple but also from violence that would kill. However, because no express provision was established for the survival of §1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of §1988. The Supreme Court also concluded that 42 U.S.C. §1986, which provides for a limited survival action for suits brought under §1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in §1983 was indicative of Congressional intent to incorporate state remedies.

We therefore conclude that Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions

---

5 The following cases have incorporated the states' wrongful death remedies into §1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action in their own right: Wolfer v. Thaler, 525 F.2d 977 (5th Cir. 1976); Spence v. Staras, supra, n. 4; Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974); Brazier v. Cherry, supra, n. 4; Smith v. Wickline, 396 F. Supp. 555 (W.D. Okla. 1975); Jones v. Murphy, supra, n. 3; Pollard v. United States, 384 F. Supp. 304 (M.D. Ala. 1974); Bailey v. Harris, 377 F. Supp. 401 (E.D. Tenn. 1974); Smith v. Jones, 379 F. Supp. 201 (1973), sum. aff'd., 497 F.2d 924; Love v. Davis, 353 F. Supp. 587 (W.D. La. 1973); Galindo v. Brownell, 255 F. Supp. 930 (S.D. Cal. 1966).

6 In Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that §1988 was not intended to be a basis for an independent cause of action but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited Brazier with apparent approval as an example of the proper incorporation of state law under §1988. Consistently, the Court in Moragne v. United States Marine Lines, infra., n. 10, characterized a wrongful death action as essentially remedial because it does not impose an additional duty of care on the tort-feasor.

were merged so that the §1983 claim should be dismissed.[7]

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.[8] Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In Smith v. Wickline, supra, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not allow the recovery of punitive damages. In Galindo v. Brownell, supra, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.[9] Finally, in Jones v. Murphy, supra, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in §1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas[10] of the law, we do not believe that such a remedy exists

---

7 The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under §1983. See Moor v. County of Alameda, supra, n. 6, and Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

8 Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

9 See also Spence v. Staras, supra, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a §1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

10 For instance, in Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In Sea-Land Services v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974), the Court began to spell out some of the parameters of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

with §1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.[11]

The plaintiff's fourth and final theory for obtaining a separate recovery under her §1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

These deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under §1983, and that a cause of action can be maintained only by the "person injured." See

---

[11] Were we to rule otherwise, this court would have to fashion a remedy for a federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a Moragne wrongful death action whether such an action is limited to dependents only. See, e.g., Hamilton v. Canal Barge Co., 395 F. Supp. 978 (E.D. La. 1975).

Hall v. Wooten, supra, n. 4, and Javits v. Stevens, supra, n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

MR. CHIEF JUSTICE PRINGLE and MR. JUSTICE GROVES dissent.

MR. JUSTICE KELLEY does not participate.

No. 26828 - Jones v. Hildebrant

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent.

I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. §1983 (1970).

I am authorized to say that MR. JUSTICE GROVES joins in this dissent.

APPENDIX "B"

CLERK'S OFFICE
SUPREME COURT
STATE OF COLORADO
DENVER 80203

June 21, 1976

CASE NO. 26828
Jones
v.
Hildebrant

RECEIVED
JUN 22 1976
Gerash,

Mr. Walter L. Gerash,
Attorney and Counselor,
1700 Broadway, Suite 2317,
Denver, Colorado. 80202.

Mr. Edward O. Geer,
Messrs. Geer & Goodwin,
Attorneys and Counselors,
1700 Broadway,
Denver, Colorado. 80202.

Mr. William Chisholm,
Asst. City Attorney,
Room 202, Police Building,
13th and Champa,
Denver, Colorado. 80204.

Mr. Wesley H. Doan,
Mr. Joseph A. Davies,
Attorneys and Counselors,
5945 West Mississippi Avenue,
Lakewood, Colorado. 80226.

Gentlemen:

The following proceeding was this day had in the above numbered and titled case:

The petition for rehearing was denied.

Yours very truly,

RICHARD D. TURELLI, Clerk.

By Eleanor Hunt
Deputy Clerk.

APPENDIX "C"

Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203:

"13-21-201. Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

* * *

"13-21-202. Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

* * *

Appendix "C", continued:

"13-21-203. Limitation on damages. (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES, *Petitioner*

v.

DOUGLAS HILDEBRANT, ET AL.,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1976

CERTIORARI GRANTED JANUARY 17, 1977

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES, *Petitioner*

v.

DOUGLAS HILDEBRANT, ET AL.,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITION FOR CERTIORARI FILED
SEPTEMBER 20, 1976

CERTIORARI GRANTED JANUARY 17, 1977

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 16, 1973—Plaintiff filed Original Complaint
October 29, 1973—Defendant Douglas Hildebrant and the City and County of Denver filed their Answer
February 13, 1974—Defendants filed Motion for Reduction of Prayer of the Complaint
September 11, 1974—Court granted Defendants' Motion to Reduce Plaintiff's General Damages
October 21, 1974—Plaintiff Filed Amended Complaint per Motion and Stipulation (as Amended by Interlineation on November 11, 1974)
November 11, 1974—Trial to Jury Commenced
November 14, 1974—Defendants' Motion to Strike Third Claim for Relief—Granted
November 14, 1974—Plaintiff's Tendered Instructions Nos. 1, 2, 3, 4, 5, 8, and 11 Refused by the Court
November 15, 1974—Verdict Returned in the Amount of $1,500 for Plaintiff and Judgment Filed
November 22, 1974—Motion for New Trial filed by Plaintiff
December 9, 1974—Amendment to Motion for New Trial filed
January 9, 1975—Hearing on Motion for New Trial was had and Motion for New Trial was Denied
February 7, 1975—Notice of Appeal filed by Plaintiff
May 24, 1976—Opinion of the Colorado Supreme Court
June 3, 1976—Motion for Extension of Time to File Petition for Rehearing
June 14, 1976—Petition for Rehearing filed
June 21, 1976—Petition for Rehearing denied
June 23, 1976—Mandate issued
August 25, 1976—Plaintiff filed Motion to Recall Mandate
August 30, 1976—Motion to Recall the Mandate denied
January 17, 1977—Order Granting Petition for a Writ of Certiorari issued by the United States Supreme Court

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT,
ET. AL.,

Defendants.

AMENDED COMPLAINT
—filed October 21, 1974

Plaintiff states:

1st Claim For Relief

1. At all relevant times, the Defendant City and County of Denver was a municipal corporation organized under the laws of the State of Colorado.

2. At all relevant times, Douglas Hildebrant was a member of the Denver Police Department, an agent, servant and employee of the City and County of Denver, and was acting within the course and scope of his agency and employment.

3. On or about February 5, 1972, the Defendant Hildebrant, behind a day care center located at 2824 Glenarm Street, Denver, Colorado, did intentionally and wrongfully shoot Larry Jones in the back of the head, killing him.

4. Hildebrant's actions were accompanied by a willful and wanton disregard for the rights and feelings of Larry Jones and his mother Ruby Jones, and were accompanied by aggravated circumstances.

5. At the time of his death, Larry Jones was 15 years old and had a life expectancy of 54.95 years.

6. As a result of the death of her son, Ruby Jones lost his comfort, companionship, society protection and income. Additionally, Mrs. Jones incurred funeral and burial expenses, and suffered severe mental anguish, all to her damage in the sum of $1,500,000.00.

2nd Claim for Relief

7. Plaintiff incorporates by reference paragraphs 1–6 of this Complaint.

8. In shooting Larry Jones, Douglas Hildebrant was negligent in one or more of the following respects:

a. In not knowing or suspecting the decedent Larry Jones of being less than 18 years of age.

b. In using deadly force when not attacked.

c. In using deadly force when no other person was attacked with deadly force.

d. In using unreasonable means to prevent escape.

e. In using unreasonable and excessive force.

f. In failing to exhaust every other reasonable means of apprehension of Larry Jones before resorting to the use of firearms.

9. As a direct and proximate cause of Hildebrant's negligence, Ruby Jones has been injured as stated above.

WHEREFORE, Plaintiff prays for relief as stated more fully below.

3rd Claim for Relief

10. Plaintiff incorporates by reference paragraphs 1–9 of this Complaint.

11. At all times, Ruby Jones was and is a citizen of the United States and of full legal age.

12. During all times mentioned in this Complaint, Douglas Hildebrant while acting under color of law, intentionally deprived the Plaintiff of her rights, security and liberty secured to her by the Constitution of the United States, including but not limited to:

a. Her child's right to life;

b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

c. Her right to her children's equal protection of the laws.

13. As a direct and proximate cause of Hildebrant's actions, Ruby Jones has been injured as stated above.

WHEREFORE, Plaintiff prays damages in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00), special damages, exemplary damages in the amount of Five Hundred Thousand Dollars ($500,000.00), interest from the

time of filing the complaint, costs, expert witness fees, and such other relief as this Court may deem just and proper.

Respectfully submitted,
WALTER L. GERASH & DAVID K. REES

David K. Rees
Attorney for Plaintiff
1100 Cherokee Street
Denver, Colorado 80204
Phone: 893–5471

Plaintiff's Address:

2696 East 99th Avenue
Thorton, Colorado 80229

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

ANSWER
—filed Oct. 29, 1973

COME NOW the Defendants, Douglas Hildebrant and The City and County of Denver, by and through their attorneys, Wesley H. Doan and William J. Chisholm, Assistant City Attorney, and in answer to the Complaint of the Plaintiff affirm, allege, deny and aver as follows:

ANSWER TO FIRST CLAIM FOR RELIEF

1. In answer to paragraphs I and II of the First Claim for Relief, the Defendants admit the same.
2. In answer to paragraphs III, IV and VI of the Plaintiff's First Claim for Relief, the Defendants deny the same.
3. In answer to paragraph V of the Plaintiff's First Claim for Relief, the Defendants allege and aver they are without sufficient knowledge or information to form a belief as to the truth thereof and, therefore, deny the same.

ANSWER TO SECOND CLAIM FOR RELIEF

1. In answer to paragraph I of the Second Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II and V of the First Claim for Relief as though set forth herein word by word.
2. In answer to paragraph III of the Second Claim for Relief, the Defendants admit that Douglas Hildebrant did shoot Larry Jones on February 5, 1972, and as to the remaining

allegations of said paragraph, deny the same.

3. In answer to paragraph IV and the sub-paragraphs thereof, the Defendants deny the same.

4. In answer to paragraphs V and VI of the Plaintiff's Second Claim for Relief, the Defendants deny the same.

ANSWER TO THIRD CLAIM FOR RELIEF

1. In answer to paragraph I of the Third Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II and V of the First Claim for Relief as though set forth herein word by word.

2. In answer to paragraph III of the Third Claim for Relief, the Defendants allege and aver they are without sufficient knowledge or information to form a belief as to the truth thereof and, therefore, deny the same.

3. In answer to paragraph IV of the Plaintiff's Third Claim for Relief, the Defendants admit the same.

4. In answer to paragraph V, VI and VII of the Third Claim for Relief, the Defendants deny the same.

ANSWER TO FOURTH CLAIM FOR RELIEF

1. In answer to paragraph I of the Fourth Claim for Relief, the Defendants incorporate and adopt by reference their answers to paragraphs I, II, III, IV and V of the First Claim for Relief, and paragraphs I through VII of the Third Claim for Relief as though set forth herein word by word.

2. In answer to paragraphs II and III of the Fourth Claim for Relief, the Defendants deny the same.

AFFIRMATIVE DEFENSES TO ALL CLAIMS FOR RELIEF

1. Said claims fail to state a claim upon which relief can be granted.

2. That at all times pertinent to the allegations of the Plaintiff's Complaint, the Defendants, Hildebrant and Moran, were acting in the course and scope of their employment as police officers for the City and County of Denver, State of Colorado, and were in the process of attempting to apprehend a fleeing felon who had committed violations of law in their presence contrary to the provisions of the Ordinances of the

City and County of Denver and the Statutes of the State of Colorado and used no more force than was reasonably necessary in an effort to apprehend the decedent, Larry Jones, who was then and there a fleeing felon.

3. That at all times pertinent to the allegations of the Plaintiff's Complaint, the Defendant, Hildebrant, acted in self defense, having reason to believe that at the time of the incident described in Plaintiff's Complaint he was attempting to apprehend a fleeing felon and that his own life was placed in danger from use of deadly force by the decedent, Larry Jones.

4. That the Defendant, Brian Moran, did not commit any assault on the person of the decedent, Larry Jones, or batteries.

WHEREFORE, having fully answered the allegations of the Plaintiff's Complaint, the Defendants respectfully pray that this Honorable Court enter judgment in their behalf and against the Plaintiff thereon and for their costs of the within action and for such other and further relief as to the Court may seem proper in the premises.

THE DEFENDANTS REQUEST A TRIAL OF ALL ISSUES TO A JURY OF SIX.

Wesley H. Doan and William J. Chisholm, Assistant City Attorney

By _____
Attorneys for Defendants, Douglas Hildebrant and
City and County of Denver
3120 So. Wadsworth Blvd.,
2 Denver, Colorado 80227
986–1536

ADDRESSES OF DEFENDANTS:

Hildebrant
c/o Denver Police Department
13th and Champa Streets
Denver, Colorado 80204

City and County of Denver
City and County Building
Denver, Colorado 80202

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN, and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Defendants.

MOTION FOR REDUCTION OF PRAYER OF COMPLAINT— filed Feb. 13, 1974

COME NOW the Defendants above named and herewith move this Honorable Court to enter its Order reducing the prayer of the Plaintiff's Complaint on each claim for relief to the amount of $45,000.00 and

AS GROUNDS THEREFOR show unto the Court as follows:

1. That the prayer of each claim for relief presently exceeds the sum of $45,000.00 and the nature of the Plaintiff's Complaint is that of a wrongful death action filed on behalf of the surviving mother for the alleged wrongful death of her son who was at the time of his death, fifteen years old.

2. That at the time of the death of the decedent for which the Plaintiff seeks recovery in the within action, the Plaintiff was not a dependent mother and, therefore, is not entitled to recovery beyond the sum of $45,000.00.

WHEREFORE, the Defendants respectfully pray that this Honorable Court enter its Order reducing the prayer of each claim of the Plaintiff's Complaint to the statutory limit of $45,000.00.

Wesley H. Doan and
William J. Chisholm

By _____
Attorneys for Defendants
3120 So. Wadsworth Blvd.,
#2 Denver, Colorado 80227
986–1536

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal corporation,
Defendants.

MEMORANDUM OPINION and ORDER —filed Sep. 11, 1974

On October 15, 1973, Plaintiff filed a civil complaint against police officers Douglas Hildebrant (Hildebrant), Brian Moran (Moran) and the City and County of Denver (The City), alleging four claims for relief, all arising out of the shooting and consequent death of Plaintiff's son by Defendant Hildebrant. Those claims for relief were based upon (1) battery, (2) negligence, (3) violation of civil rights and (4) conspiracy to violate civil rights.

Defendants' answers admit that Hildebrant did shoot Plaintiff's son (Larry Jones) on February 5, 1972 and admit that Defendant acted under color of state law and that the individual defendants were acting within the course and scope of their employment. Defendants assert that Hildebrant acted in self defense and used no more force than was reasonably necessary in an effort to apprehend the decedent.

During the course of discovery, several matters have already been resolved. Plaintiff's subpoena of the minutes of the Grand Jury investigation of the shooting incident was quashed and Plaintiff's motion for production of the transcript of the testimony before that Grand Jury was granted by Judge Kingsley.

Defendant Hildebrant objected to Plaintiff's interrogatories numbered 4, 11, 15, 19, 20, 21, 22, 23, 25 and 26 and on oral deposition he refused to answer questions numbered (a) (b) and (c) (p. 10, 1.12; p. 52, 1.2; and p. 15, 1.15 of the transcript, respectively.) The City objected to and re-

fused to answer Plaintiff's written Interrogatories numbered 8, 17, 23, 28 and 29.

Plaintiff moved to compel answers to these questions, pursuant to Rule 37, C.R.C.P. On June 28, 1974, oral arguments were heard and this Court: (1) denied Plaintiff's Motion with respect to Interrogatories number 4, 11, 15, 19, 20, 21, 22, 23, 25 and 26, submitted to Hildebrant; (2) denied Plaintiff's Motion with respect to Interrogatory number 8 served upon the City; (3) denied Plaintiff's Motion with respect to question (b) asked of Hildebrant at his deposition and; (4) reserved its ruling on the other two questions asked of Hildebrant at his deposition and on Interrogatories number 17, 23, 28 and 29 which were submitted to the City subsequent to that date, the City has answered and withdrawn its objection to Interrogatories number 17, 28 and 29. Therefore, the questions relating to Plaintiff's Motion to Compel Discovery remaining for disposition are the propriety of compulsion of answers: (1) to Plaintiff's questions (a) and (c) on oral deposition of Hildebrant and (2) to Plaintiff's Interrogatory Number 23, submitted to the City. The information sought relates to the existence and substance of any complaints against Hildebrant or Moran during their employment with the Denver Police Department prior to the incident which is the basis of this action. Plaintiff asked, in Interrogatory number 23 to the City, "Were there any complaints, either in writing or verbally, concerning the performance, as police officers, of either Officer Hildebrant or Officer Moran during their employment as officers of the Denver Police Department prior to the incident in question?" Plaintiff asked Hildebrant, an oral deposition, "Have you ever been subject to any disciplinary action since you have been in the Denver Police Department?" and "All right, now, have you ever been disciplined prior to February 5, 1972 for using excessive force on a subject?" In response to Plaintiff's Motion to Compel Answers to these three questions, Defendants assert that the information sought is privileged.

Defendants have also moved for an Order reducing Plaintiff's prayer for relief. Plaintiff seeks relief in the amount of One Million Five Hundred Thousand Dollars special damages and Five Hundred Thousand Dollars in exemplary damages. Defendants seek to reduce Plaintiff's claim for relief to $45,000.00 in accordance with the Colorado Wrongful Death Act (C.R.S. 1963, 41–1–1 *et seq.*) Plaintiff has stipulated to a reduction in the amount of her prayer with respect to the claims based upon state law, but asserts that the Colorado Wrongful Death Act does not limit the amount or type of damages available under the Federal Civil Rights Act.

QUESTION I.

Does Plaintiff's Discovery seek material which is privileged under the Colorado Open Records Act or Under the Common Law?

Defendants object to the discovery of the existence and history of civilian complaints filed against Hildebrant or Moran as being statutorily exempted from discovery, under the Open Records Act, 1969 Perm. Supp., C.R.S., 1963, 113–2–4 and under the common law.

Defendants' objection based upon the Open Records Act is not well founded. At the outset, it should be noted that this argument is inapplicable to the questions asked of Hildebrant; those questions did not seek access to any public records, although the information sought parallels information available in police department files. The Supreme Court of Colorado, in *Cervi and Co. v. Russell*, 519 P.2d 1189, distinguished between the right to receive information from public records, which is the subject of the Open Records Act, and the right to obtain the same information from other sources, which is unaffected by the Open Records Act. In adopting the reasoning of the Court of Appeals, the Court said: " 'The freedom of the press and Cervi's right to publish and disseminate birth and death information are not at issue here. The only issue is Cervi's right to receive this information from the Department of Public Health and the duty of that department to preserve the confidential nature of its records. Cervi is at liberty to publish the information, but must obtain it from other sources.' " *Cervi & Co. v. Russell*, *supra*. Thus, although the Open Records Act may have some applicability to discovery of the police files, it does not apply to discovery of Hildebrant or Moran's history from their own mouths.

Moreover, the Open Records Act does not limit legitimate discovery in a civil action. It is clear that the Act was intended to broaden public access to public records, not to create new statutory privileges. One of the purposes of the Act was to eliminate the necessity of a showing of special interest as a pre-requisite to access to public records. The

committee of the Colorado Legislative Council charged with the responsibility of researching the need for and drafting an open records act found that, historically, a showing of special interest was a pre-requisite to access to public records. The committee also found no assurance that this requirement would be eliminated by the Colorado Courts. *Colorado Legislative Council, Research Publication No. 126*, p. XI. Thus, the Open Records Act is a legislative response to the felt need to eliminate the requirement of special interest for access to public records. The Act reflects this purpose by declaring as general policy that all public records shall be open for inspection by "any person." And the declaration of policy accompanying the bill included an express declaration of this policy. *Research Publication No. 126*, p. XIII. Some exceptions to this rule of general access were made where a need for confidentiality was shown. It is clear that the exceptions to the Open Records Act policy relied upon by Defendants are exceptions to the general policy granting free access to "any person." The Act creates no new privilege where, as here, the person seeking access to public records has a special interest in the records, as required by the law prior to the enactment of the Act.

This interpretation of the Act is consistent with *Losavio v. Mayber*, 496 P.2d 1032 (1972), wherein it was held that the police files of prospective jurors were public records under the Act. In Losavio, Defendants' attorney learned that the police department was making the conviction records of prospective jurors available to the District Attorney, but that those records were not made available to defendants' attorney. Losavio sought to have the actual police files and records opened to inspection by the general public. In denying Losavio access to the actual police files, the Court noted that the files contained information which went far beyond the purposes for which jury lists are properly used, and beyond the information provided to the District Attorney. However, the Court found no meritorious reason for denying Losavio access to those elements of the police files which were provided to the District Attorney.

Under this interpretation of the Act, the other two cases cited by Defendant, *Cervi & Co., supra* and *Denver Publishing Co.*, 519 P.2d 1189, are inapplicable to this issue because the Plaintiffs in those actions were seeking public records as members of the general public and not as interested persons. There is no support for a finding of

privilege for police files or personnel records under the Act where those records are sought in legitimate discovery in a civil action.

However, a finding of no statutory privilege under the Act is not dispositive of Plaintiff's motion; Defendants also assert privilege under the common law.

The case of City of *Los Angeles v. Superior Court*, 33 Cal.App. 3rd 778, 109 Cal.Rptr. 365, cited by Defendants in support of a common law privilege, does not support such a privilege. Although the facts in this case closely parallel those in *City of Los Angeles*, a common law privilege may not be inferred from that case, since the privilege upheld in *City of Los Angeles* was based upon a California statute. California Evidence Code Sec. 1040 provides:

> "(a) . . . . 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed to the public. . . .
>
> "(b) A public entity has a privilege to refuse to disclose official information, ... if the privilege is claimed by a person authorized by the public entity to do so and . . . (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice, ..." The Court's analysis in this case revolved completely around the application of this section; the case gives no indication of the existence of a common law privilege in California."

Nor are Defendants' references to the encyclopedias and the authority contained therein convincing on this issue. One thing that is clear from the encyclopedias is that the law is not clear or uniform among the fifty states on this point. For example, Defendants accurately cite *Am Jur* 2d to the effect that police records are secret and not open to common inspection (66 *Am Jur* 2d, Records and Recording Laws §27), but there is also authority (23 *Am Jur* 2d, Depositions and Discovery, §175) for the more specific point that police records are discoverable in a civil action.

The Court has been referred to no Colorado cases which support a common law privilege for police records or personnel files; nor has it found any support in its own review of the law. In the absence of clear authority from other jurisdictions and in light of Colorado's comprehensive statute granting privileges in a variety of confidential relationships (C.R.S., 1963, 154–1–7), it is not appropriate for this Court to fashion such a privilege.

Moreover, the Court believes that C.R.S., 1963, 154–1–7 (6) adequately provides protection to the confidential nature of complaints against police officers and of the internal investigations and disciplinary measures of the police department. The statute provides:

> ". . . . a person shall not be examined as a witness in the following cases:
> (6) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court would suffer by the disclosure."

Although Defendants have not specifically sought the protection of this section, their assertions of privilege are sufficient to invoke its protection, with respect to the questions asked of the City. Therefore, the Court will direct that within 20 days the information sought from the City be submitted to the Court for determination of its relevancy to this case, and the importance of its confidentiality, before that information is released to Plaintiffs. As to the questions asked of Defendants Moran and Hildebrant, the Court directs that answers be given within 20 days.

QUESTION II.

Do the Colorado limitations on damages in wrongful death actions apply to Plaintiff's claims for relief?

Since Plaintiff has stipulated to reduction of her prayer with respect to the claims based upon state law, the only question left for determination is the applicability of the Colorado limitations on damages in wrongful death actions to Plaintiff's claims under the Federal Civil Rights Act, 42 U.S.C. §1983.

Plaintiff acknowledges that she would have no claim of right at common law; at common law there is no right arising out of the death of a person, enforceable by the surviving parties. Moreover, Plaintiff does not assert that this rule has generally been abrogated by the Federal statutory law. However, Plaintiff does assert that the Colorado Wrongful Death Act (C.R.S., 1963, 41–1–3) grants to survivors a statutory right, the deprivation of which is actionable under 42 U.S.C. §1983.

The Colorado Wrongful Death Act (C.R.S., 1963, 41–1–1 *et seq*) does create a new cause of action but it does not generally abrogate the common law rule that no person may recover for

the death of another. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930.

The Federal Civil Rights Acts do not abrogate the common law rule. 42 U.S.C. §1988 does provide that where the Federal law is inadequate to carry the Civil Rights Act into effect, whatever remedies state law provides will also be available in Federal Courts. *This provision has been interpreted as permitting suits to be brought by survivors in Federal Courts to enforce a decedent's civil rights where the forum state provides for survival of a decedent's cause of action. Brazier v. Cherry*, 293 F.2d 401, (10th Cir. 1961). 42 U.S.C. §1988 does *not* create any rights in survivors broader than those which state laws provide; *it merely permits the use of state remedies in Federal Courts.*

In this case, the only effect of §1988 is to permit Plaintiff to bring her wrongful death claim in Federal Court, alleging violation of her son's constitutional rights. By incorporating C.R.S., 1963, 41–1–1 *et seq* into Federal law, §1988 permits Plaintiff to bring a wrongful death action in Federal Courts even though such actions are not generally authorized in Federal Courts. Since Plaintiff does not seek access to Federal Courts, her rights in the present case have not been enhanced by §1988.

Moreover, in incorporating the Colorado authorization of wrongful death actions into Federal law, §1988 incorporates the whole of that law, including the limitations on that right. In *Salazar v. Doud*, 256 F.Supp. 220 (D.C. Colo. 1966) the Plaintiffs invoked §1988 to assure the survival of a decedent's claim of violation of his civil rights under §§1983 and 1985. The Federal Court restricted the elements of recovery to those set forth in the Colorado Survival Statute C.R.S. 1963, 153–1–9.

This result (i.e. having a state limitation on damages apply to a federal claim) is not anomolous. For example, in *Barton v. U.S.*, 330 F.2d 466 (10th Cir. 1964), the Colorado statutory limitation on gross recovery in wrongful death actions was held applicable to a cause of action under the Federal Tort Claims Act.

Since Plaintiff is not a dependent mother, her claim for relief is limited to $45,000, (1969 Perm.Supp., C.R.S. 1963, 43–1–3) and she is governed by the net compensatory loss standard applicable to wrongful death actions.

THEREFORE, IT IS ORDERED that Defendants' Motion

to Reduce Plaintiff's General Damages to $45,000.00 is granted.

DONE AND SIGNED IN OPEN COURT this 11 day of September, 1974.

BY THE COURT:

District Judge

cc: David K. Rees, Esq.
Walter L. Gerash, Esq.
Attorneys for Plaintiff
1100 Cherokee Street
Denver, Colorado 80204

Wesley H. Doan, Esq.
Attorney for Defendants
3120 So. Wadsworth Blvd. #2
Denver, Colorado 80227

William J. Chisholm, Esq.
Attorney for Defendants
Police Building
13th and Champa
Denver, Colorado 80204

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT, ET. AL., *Defendants.*

MOTION AND STIPULATION —filed Oct. 21, 1974

COMES NOW the Plaintiff by and through her attorneys, Walter L. Gerash and David K. Rees and moves, pursuant to stipulation, that the Complaint presently before this Court be dismissed insofar as it applies to the Defendant Brian Moran, and that Plaintiff be permitted to amend her Complaint as per the copy attached hereto.

AS GROUNDS THEREFOR, Plaintiff states:

1. Through discovery procedures, she has obtained information not available to her at the time the original Complaint was filed.

2. The Complaint, as amended, more accurately reflects the basis of her injury.

IT IS EXPRESSLY UNDERSTOOD, that this Complaint, as amended, contains a prayer in the sum of $1,500,000.00 compensatory damages and $500,000.00 exemplary damages despite the fact that on September 11, 1974 this court granted Defendants motion to reduce the prayer of $45,000.00. In signing this Stipulation, counsel for the Defendants is in no way consenting to a modification of that order, and the larger prayer is included for the purpose of protecting Plaintiff's record.

IT IS FURTHER STIPULATED, that the Answer already filed by the Defendants in this action shall serve as an answer to the amended complaint, however, the Defendants may, at their option amend their answer to conform to the amended complaint.

Respectfully submitted,

WALTER L. GERASH &
DAVID K. REES
Attorneys for Plaintiff

David K. Rees
1100 Cherokee Street
Denver, Colorado 80204
Phone: 893–5471

WILLIAM CHISHOLM &
WESLEY DOAN
Attorneys for Defendants

Wesley Doan
3120 South Wadsworth Boulevard
Denver,
Colorado 80227
Phone: 986–1536

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Courtroom 3

RUBY JONES, *Plaintiff,*

vs.

DOUGLAS HILDEBRANT, ET. AL., *Defendants.*

ORDER—filed Oct. 21, 1974

THIS MATTER having come before this Court, and the Court being fully advised in the premises hereby orders that the Plaintiff, Ruby Jones, may amend her complaint as per the Motion and Stipulation which has heretofore been filed in this matter.

DONE THIS 21 day of October, 1974.

BY THE COURT:

JUDGE

AND AFTERWARDS, and on to-wit, the 14th day of November, A. D. 1974, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

+ + +

JUDGE CHARLES GOLDBERG

RUBY JONES

vs.

DOUGLAS HILDEBRANT, ET AL

C–39926

ORDER:
TRIAL TO JURY RESUMED
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR NEGLIGENCE—DENIED
DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S 3RD CLAIM FOR RELIEF—GRANTED
DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES—GRANTED
JURY INSTRUCTED
JURY RETIRES

At this day come again the said parties hereto, by their attorneys, respectively.

And the said jurors being now all here present, and in the jury box, the trial of the issues herein joined is resumed.

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to dismiss Plaintiff's claim for negligence, and the Court now being sufficiently advised in the premises, doth deny said motion.

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to strike Plaintiff's THIRD CLAIM for Relief on the grounds that it is redundant with FIRST CLAIM for Relief, and the Court now being sufficiently advised in the premises, doth grant said motion.

(THE 14TH DAY OF NOVEMBER, A. D. 1974)

And thereupon, the said Defendant doth orally move the Court, at the conclusion of evidence, to dismiss Plaintiff's claim for punitive damages, and the Court now being sufficiently advised in the premises, doth grant said motion.

And the said jurors having heard the evidence adduced herein as well on behalf of the said plaintiff and as of the said defendants and the arguments of counsel, and being duly instructed by the Court, retire to their room in charge of a sworn bailiff, to consider of their verdict herein.

And thereupon, IT IS ORDERED BY THE COURT that the Jury is to return on the 15th day of November, A. D. 1974, at the hour of 9:00 A.M. to resume deliberations.

And the said jurors, being each duly cautioned by the Court not to converse among themselves, nor with others, touching

the matters at issue herein, nor to listen to such conversation of others, nor to read nor hear read any publication bearing upon the same, are permitted to separate.

+ + +

PLAINTIFF'S TENDERED INSTRUCTION NO 1

INSTRUCTION NO._____

The $45,000 limitation which applies to the Plaintiff's claim for wrongful death, is not applicable to Plaintiff's claim for deprivation of her civil rights. There is no limitation to the award you may return on this claim, so long as the damages, if any, you find fairly and justly compensate the plaintiff and are supported by a preponderance of the evidence.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

_____
JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 2

INSTRUCTION NO._____

If you find in favor of the Plaintiff, Ruby Jones, on her claim of deprivation of civil rights then you shall assess to her damages, insofar as they were proximately caused by the Defendant's actions, an amount which will reasonably and justly compensate her for her damages, if any.

In determining such damages you shall take into consideration the following:

1. Any pecuniary loss she may have suffered.
2. The emotional and mental distress she may have suffered.
3. The loss of companionship of her son.
4. The value of loss of her civil rights.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 3

INSTRUCTION NO._____

Although damages must be measured by pecuniary loss to the Plaintiff, in fixing such loss you are not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of such non-economic interests of a family as loss of comfort, society and protection.

REQUESTED BY PLAINTIFF &
REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 4

INSTRUCTION NO._____

When a person is deprived of a constitutional right, damages are presumed from the wrongful deprivation of it without evidence of loss of money, property, or any other valuable thing, and you may award damages based upon your own personal knowledge of that right.

REQUESTED BY PLAINTIFF, & REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 5

INSTRUCTION NO._____

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages on her claim of deprivation of civil rights; and should further find that the act or omission of the Defendant, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 8

INSTRUCTION NO._____

In order to prove her claim of deprivation of civil rights, the burden is upon the Plaintiff to establish, by a preponderance of the evidence in this case, the following facts:

1. The Defendant, Douglas Hildebrant, knowingly shot Larry Jones wounding him in the head, as alleged;
2. The Defendant acted under color of law;
3. The acts and conduct of the Defendant, Douglas Hildebrant, of which Plaintiff complains, were knowingly done in such a manner as to deprive the Plaintiff of her Federal Constitutional right without due process of law.

REQUESTED BY PLAINTIFF, &
REFUSED BY THE COURT
Date: Nov. 14, 1974

_____
JUDGE

PLAINTIFF'S TENDERED INSTRUCTION NO 11

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed, only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the condition under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

IN THE DISTRICT COURT
AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO
COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal corporation,

Defendants.

EXCERPTS FROM TRIAL TRANSCRIPT
—November 11, 1974

MR. GEER: Your Honor pleases, number one, I think I submitted a case here in the informal discussion earlier. We would move that the issue of punitive damages be stricken from this case and no instruction given since they can't entertain it. And we would cite to the Court—of course, the Court is already familiar with it—*Herbertson v. Russell*, a 1962 case. I am sorry I don't have the Colorado citation (150 Colo. 110). I have the Pacific Reporter. 371 P. 2d 422. As the Court knows, that case stands primarily for one of the principal tenets of law in this state:

> ". . . . the damages to be awarded in a wrongful death case are compensatory only, and not exemplary in the sense that they are imposed as a penalty against the wrongdoer. Nor are they a solatium for the grief of the living occasioned by the death of their relative, 'however dear.' "

We would submit that the federal Civil Rights Act, §1983 and §1988, mentioned in the Third Claim for Relief of the Amended Complaint could only refer substantively to the Wrongful Death Statute in Colorado. And it would be redundant and repetitive and similar to the Second Claim for Relief—or, the First Claim for Relief, rather—which is based on intentional tort, I am sorry. And, therefore, that Claim for Relief should be stricken. It's superfluous. The only way that the Civil Rights Act would apply would be a jurisdictional question if the case were in Federal Court. And the law is clear, that even if it is in Federal Court, the court will look to

the state organic law or substantive law, in this case the Wrongful Death Statute, and apply that. As far as this Jury, we, the state court, when they have alleged a wrongful or a civil rights violation, I think that the Court would obviously have to follow the substantive law of the Colorado Wrongful Death Statute.

And I would mention to Your Honor two cases briefly here, *Sauls v. Hutto*, a 1969 case, in 304 Federal Supplement 124. This is a wrongful death action. And addressing this to that Federal Civil Rights Third Claim for Relief in the headnote, and then I'll go to the body of the decision very briefly.

> "Motion of 17-year-old boy who was shot by police officers while attempting to flee from crashed automobile when he had stolen could not recover against officers, under Civil Rights Act, on theory that police officers had violated state law in shooting son, inasmuch as Civil Rights Act protects only federal rights that are violated under color of state law. 42 U.S.C.A. §1983.
>
> "Fact that mother of 17-year-old boy who was fatally shot by police officers while attempting to flee from crashed automobile which he had stolen was entitled to recover damages for her son's death under state law pretermitted determination of her claim under Civil Rights Act that her son was deprived of his life without due process when officers killed him merely to protect property. 42 U.S.C.A. §1983."

The Court states in furtherance of that headnote No. 2 that:

> "The second basis for plaintiff's claim under Section 1983 is in effect that any time a person is killed by a law enforcement officer merely to protect property, he has been deprived of his life without due process of law, and, consequently, his federal constitutional rights have been violated. Since plaintiff is entitled to recover damages for her son's death under state law, determination of her federal constitutional claim is pretermitted because it would afford her no additional relief."

We are saying they are one and the same. Now, if he is entitled to recover under the state Wrongful Death Act, the Third Claim under the Federal Civil Rights Act is redundant or should be part and parcel of the Wrongful Death claim in the Second Claim for Relief.

Now, in addition, Your Honor—and this is a Connecticut case, *Perkins v. Salafia*, in the Federal District Court, a 1972 case, 338 Federal Supplement 1325.

> "The District Court, Blumenfeld, Chief Judge, held that complaint on behalf of individuals did not state cause of action under provision relating to civil action for deprivation of rights but complaint of administratrix on behalf of estate did state cause of action under Civil Rights Act."

Because we don't have that here—a survival action as this case here—it is a wrongful death statute.

> "Plaintiffs as individuals must allege deprivation of their own federally protected rights in order to state claim under Civil Rights Act. 42 U.S.C.A. §§1983 and 1988.
>
> "Where state did not provide for additional remedy to individuals whose relative was wrongfully slain, federal statute relating to proceedings in vindication of civil rights did not provide any remedy. 42 U.S.C.A. §1988.
>
> "Connecticut's wrongful death statute was wholly adequate to vindicate claim under federal statute relating to civil action for deprivation of rights."

The Court said in reference to that last language that:

> "Since Connecticut does not provide for an additional remedy for the plaintiffs in their individual capacities, one cannot be created by application of §1988 under Civil Rights Act."

The last I am paraphrasing.

> "The remedy Connecticut does provide is wholly adequate to vindicate the claim under §1983." Citing cases.

* * *

MR. REES: Your Honor, there are three claims in our Complaint. The first is battery, the second is negligence, the third is 1983.

We have no argument with the fact that *Herbertson v. Russell*, *Sauls v. Hutto*, and *Perkins v. Salafia* would all apply to the First and Second Claims for Relief, that we could not obtain punitive damages under the actions which are not federal 1983 actions; however, we feel that we are entitled to them under the Third Claim for Relief and we feel that is proper.

Let me comment for a moment on the two cases which Mr. Geer has commented on. Starting with *Perkins v. Salafia*. *Perkins v. Salafia*, which was quoted in my Brief that I submitted to this Court earlier in my motion on damages, stands for the proposition that where you have the survivorship statute that does not create an independent right in the survivors. They are merely suing on a right which the dead person had. And the Court in that case specifically distinguished *Galindo v. Brownell*, 255 Federal Supplement 930, Southern District of California, 1966, and pointed out that the Califor-

nia Wrongful Death Statute did create such a new independent right and therefore, Galindo did not apply to Connecticut, which did not. Colorado's Wrongful Death Statute creates a new independent right in Mrs. Jones. The wording of the statute so states; and there is a case, which, I believe, is *Moffatt, et al v. Tenney*, 17 Colorado 189, 30 Pacific 348, 1892, which states specifically that it creates an independent right in Mrs. Jones. So, *Perkins* is right on point and it explains exactly why Mrs. Jones can collect, whereas the Plaintiff in that case could not.

The second case that counsel mentioned, *Sauls v. Salafia*, this came out of Louisiana. And Mr. Geer referred to the headnotes. The first headnote states "Wrongful Death Action", and I think that is misleading, because when you start looking at the case, and you really look at the case, the case is brought pursuant to Article 2315 of the Louisiana Code, called "LIABILITY for Acts Causing Damage; Survival of Action." A copy of which I would hand to the Court at this point. And, from which it is clear that the Louisiana statute is also a survivorship statute and not a wrongful death statute, and therefore, I have no argument that the 1983 action in *Sauls v. Salafia* would be improper based exactly on the same reasons as *Perkins*, that there is no independent right created under that statute. Therefore, we feel that because there is no independent right created, those cases are improper.

Now, United States Supreme Court in *Sullivan v. Little Hunting Park*, that is at 396 U.S. 229 has stated that the existence of a statutory right implies the existence of all measures and appropriate remedies. And they went on further and said that compensatory damages for deprivation of a federal right are governed by a federal standard and provided by 42 U.S.C. §1988. This means as we read Section 1988 that both federal and state rules on damages may be utilized whichever better serves the policies expressed in the federal statute. "The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." The Colorado Wrongful Death Act is a statutory right that Mrs. Jones has. It gives her a right. That right, we allege, has been impaired by the improper shooting of her son, thereby violating her right to due process. It is therefore a deprivation of her federal constitutional rights; and because it is a deprivation of her federal constitutional rights, as the Supreme Court pointed out,

the federal measure of damages controls. And, as I stated, the federal cases, without exception, allow punitive damages in death cases. There is not a single case, to my knowledge, where there is a wrongful death action as opposed to a survivorship action where a court has held that one could not bring punitive damages in a case where there had been an intentional tort. And this is, of course, an intentional tort.

* * *

Therefore, we would oppose the opposition's Motion to Strike our Punitive Damages Claim; and we would also oppose their Motion to Strike the Federal 1983 Claim.

THE COURT: Okay.

Anything further?

MR. REES: No, Your Honor.

THE COURT: Okay.

Did that case that you just read from deal with a death case, do you know?

MR. REES: No, the *Sullivan v. Little Hunting Park* case is a racial discrimination case. It is not a death case.

THE COURT: All right.

MR. REES: Let me add for the record that the only death case that I have found which comes close to being on point is *Kozar v. Chesapeake & Ohio Railway Co.*, found at 320 Federal Supplement 335, in which John Kozar, a railroad worker, was killed while attempting to derail a train car. His wife, as the administratrix of his estate, alleged that the Railroad had committed a willful, wanton or reckless disregard for his safety. The Jury agreed and awarded her $120,000.00 in compensatory damages and $70,000.00 in punitive damages.

Now, that is not on point, but I think the logic of that case may apply to the case at bar.

* * *

The Court will rule as follows on all pending motions that were raised at the conclusion of the Plaintiff's case and now at the conclusion of all of the evidence.

The first motion raised by the Defendant was to Dismiss the Claim of Negligence that has been Asserted by the Plaintiff against the Defendants. That Motion will be denied. The Court feels that the Plaintiffs have established a prima facie case of negligence. The Court feels that although the Defend-

ant, Douglas Hildebrant, admitted shooting the Plaintiff's son, that that admission, in and of itself, does not predetermine any rights that the Plaintiffs may have by virtue of the proof that they have established in this case on the claim of negligence. The Court feels that the Plaintiff has established a prima facie case considering the evidence in the light most favorable to the Plaintiff. The Court recalls that the evidence elicited by the Plaintiff indicated that the police officer on the night in question, as he approached the building, was in the focus of some light that emanated from the building; that the deceased also was bathed in light as he exited from the Day Care Center. The Court feels that the issue of whether the police officer could, or should, have discerned what, if anything, was in the deceased's hand is an issue of fact. And, whether the police officer exercised due care in response thereto is a question of fact. The Court feels that there is also a question of fact as to whether the police officer failed to exhaust every other reasonable means of apprehension of the deceased before resorting to shooting him. And the court feels these are questions of fact for the Jury; and accordingly, the Motion of the Defendant to Dismiss the Plaintiff's Second Claim set forth in their Amended Complaint will be denied.

With reference to the Defendant's request that Count Three be dismissed by virtue of its being merged into Count One, the battery claim, the Court would make the following observations in reference thereto. The Court would note that Mrs. Jones, in her Third Claim for Relief, claims deprivation of her civil rights in three material respects. Number one, her child's right to life. Two, the right to her child's freedom from physical abuse, cohersion, intimidation and physical death. Three, her right to her child's equal protection of the law. Her claim under equal protection of the law is absurd at this juncture when considered in light of the evidence produced at trial. Her other claims, however, can only be coextensive with her son's rights in these areas; that is to say, she can have no greater rights to her son's life than he, himself, had to his own life. And to the extent that Larry Jones had inalienable rights to life and freedom from physical abuse, these rights are covered by substantive tort law which includes the defenses available under that law, particularly the defenses of self-defense and the fleeing felon laws. Therefore, the Court feels that in this case the Plaintiff's First and Third Claims for Relief are coextensive, congruent, redundant in this case when considered in the light of the evidence. The Court can

envision, however, where a case could arise where the state and federal claims are not redundant, but the Court does not feel that under the evidence established in this case that that has been established.

* * *

THE COURT: . . .

In this case the Colorado Wrongful Death Act does provide for the vindication of a decedent's rights, privileges and immunities by the bringing of an action by their survivors. The cause of action does not need to be state based. A claim for death arising out of the wrongful deprivation of the decedent's civil rights would be permitted equally with a claim for death arising out of breach of a state law mandated "standard of care". However, Mrs. Jones cannot successfully challenge in this case, in light of the evidence, the Colorado Wrongful Death Act as being inadequate to protect her rights, privileges and immunities of her son without also challenging the Federal Civil Rights Act on the same basis. Now, to the extent that the Colorado acts are inadequate to protect the decendent's rights, the federal statute is likewise deficient. So, since the only federal law which provides any law as to measure of damages recovery enforcing the civil rights of the decedent, and that part is set forth in 42 U.S.C. §1988, which provides for adoption in the federal law and state law remedies, thus in this case to the extent that Colorado law is not applicable, the Court feels that no recovery of any type is provided. So, in summary, what we have are claims in which the elements are virtually identical to that which are set forth in the First and Third Claim. The only substantive difference, really, is the Colorado state law issue which is admitted in this case. So, the Court feels that they are merged in the First Claim. And, the Plaintiff's Third Claim for Relief will be dismissed at this time.

MR. REES: On your last ruling, just for the record, we feel that since we were entitled to exemplary damages under the Federal Civil Rights Statute and that because of the fact that the statute limits damages to $45,000.00 for a child—which I think is unconstitutional—and also because the Court made a ruling of net pecuniary worth, that, in effect, denies Mrs. Jones' rights; and therefore the federal remedy for a whole recovery because the Constitution of the State of Colorado provides that where there is a wrong, there should be an

adequate remedy, and therefore, the Federal Civil Rights Statute can step in and give an additional remedy to overcome this situation. And coupled with the fact that the decedent was black and the Plaintiff is black and this is a ghetto area, and there the Jury can infer that this type of shooting wouldn't have taken place in East Denver, Southeast Denver, West Denver, or Lakewood. They can feel that the black was singled out for poorer treatment and more trigger-happy action than as against a white person. So, therefore, we feel that the Civil Rights Statute was made to add a dimension to those who are politically and economically oppressed. And, therefore, we feel that this Civil Rights Statute has a function as a supplement to the inadequate damages and to the unique denial of civil rights which are a factual issue in this case.

That's all I have.

* * *

All right, Gentlemen, are there any Instructions to be tendered at this time?

MR. REES: Yes.

Plaintiff tenders Instructions numbered 1 through 11. There was one Instruction not marked, and I marked it No. 11, and it is not at the tail end. So, let the record reflect we are tendering Plaintiff's Instructions No. 1 through No. 11.

THE COURT: The Court did not mark what you have marked No. 11 because I thought that was a continuation of page 2 what is marked Instruction No. 5. But, in any event, I have considered that together with all the other Instructions No. 1 through No. 10, and of course the one that is marked No. 11, and the Court feels either that they are incorrect statements of law applicable to this case, or they are already embodied within Instructions No. 1 through No. 28 which the Court will give. So, for those reasons the Court will refuse Plaintiff's tendered Instructions No. 1 through No. 11.

* * *

REPORTER'S CERTIFICATE

(Omitted in printing)

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO
COURTROOM NO. 3

Civil Action No. C–39926

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal corporation,

Defendants.

EXCERPTS FROM TRANSCRIPT OF HEARING —January 9, 1975

PROCEEDINGS

THURSDAY, JANUARY 9, 1975

WHEREUPON, the following proceedings were had and entered of record:

(WHEREUPON, the following transcript was prepared pursuant to No. 10 of the Designation of Record, which reads as follows, "Transcript of Judge's Order re: Motion for New Trial—denied.")

THE COURT: You may proceed, Mr. Rees.

(WHEREUPON, Mr. Rees, on behalf of the Plaintiff, argues his Motion for a New Trial.)

THE COURT: All right.

Did you have any response you wish to make?

MR. GOODWIN: Pardon me, Your Honor?

THE COURT: Do you wish to respond?

MR. GOODWIN: It is not necessary, Your Honor. I do have some cases that I can cite Your Honor about the question of damages, and that is all.

THE COURT: All right. I don't believe that is necessary—

MR. GOODWIN: Thank you.

THE COURT: —because I don't believe the damages were inadequate as a matter of law.

The Plaintiff's Motion for New Trial will be denied. The

Court has carefully considered the Motion for New Trial, together with the Brief filed by the Plaintiff in support of his Motion for New Trial. Considering the evidence in this case, it is obvious that, while the verdict is not large, the Court does not feel that it is grossly and manifestly inadequate as a matter of law, particularly in light of the fact that we have in Colorado the net pecuniary loss rule. The tangible out-of-pocket losses incurred by the Plaintiff as a result of the loss of her son as established by the evidence indicated that funeral expenses were approximately $1,000.00. And the evidence on that was not all that clear because there wasn't any documentary evidence as to what the funeral bill actually was, but I think everyone concedes, including the defense, that the funeral expenses were approximately $1,000.00 Now, over and above that the Plaintiff had to establish that she did suffer a net pecuniary loss under Colorado law; and there was some difference between the funeral expense and the amount of the award; and it is conceivable to the Court that perhaps the Jury did consider that that was the extent of the net pecuniary loss the Plaintiff did suffer as a result of the loss of her son. So, this Court cannot say, as a matter of law, that the verdict, while admittedly small, was grossly or manifestly inadequate. Accordingly, ground No. 1 is not well taken.

Ground No. 2, "The Court erred in dismissing Plaintiff's claim brought pursuant to 42 U.S.C. §1983," is not well taken. The Court will not comment further. The Court's reasons for dismissing this claim were articulated and enunciated in great detail during the course of this trial. No further comment needs to be made on that.

With reference to ground No. 3, namely, the failure of the Court to instruct according to Plaintiff's tendered Instructions No. 1 through No. 10, the majority of those deal, frankly, with the Claim brought pursuant to 42 U.S.C. §1983, which was dismissed. And, accordingly, the Court's reasons for not giving those Instructions that relate to the 1983 Claim were articulated at the time that the Court dismissed the Claim for 1983, and of course, it would be improper to instruct the Jury on a Claim that had been previously dismissed. The other Instructions that were tendered by the Plaintiff basically relate to the Plaintiff's Complaint that the net pecuniary loss rule is not the law in Colorado—or, rather, recognizing that it is the law in Colorado, should not be the law in Colorado. However, this trial court is bound by the net pecuniary loss rule; and accordingly, those Instructions that

seek to deviate in any way from the net pecuniary loss rule should not have been given; and accordingly, the Court does not find that it was error not to instruct according to Plaintiff's tendered Instructions that deviated from the net pecuniary loss rule. The other tendered Instructions, as the Plaintiff indicates, are really moot because the Jury has found in favor of the Plaintiff on the issue of liability. So, ground No. 3 will be denied.

And that will dispose of the pending Motion for New Trial. And you may seek review of this matter at this time, if you wish.

* * *

RUBY JONES

the Plaintiff herein, called as a witness in her own behalf, being first duly sworn by the Court Clerk, was examined, and upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. GERASH:

.....

Q. Okay. Now, you indicated that Larry helped around the house like no other child you had?

A. That is right.

Q. Could you tell us the chores he did in the house?

A. Well, he cooked, he cleaned, he washed, he ironed. And, also, he loved to bake cakes. He baked more cakes than I did, because I don't like to bake cakes. And he was always baking a cake. And he also baked cakes from scratch.

Q. What do you mean by that?

A. Well, you know, you buy cake mix?

Q. Pre-mix?

A. Right. And then from scratch you had to go all the way.

Q. Did he do any chores to your house when you had a garden?

A. Yes. I had a garden in the back where I lived on Williams; and he also helped me in it. You know, like getting the weeds out, and things like that.

Q. All right. Now, was there any incident that you remember in your life that surprised you concerning Larry's

concern of the household with regard to giving you or offering you any money?

A. Yes, I do.

Q. Tell us about that?

A. I was short on paying my utility bill and he gave me some money to help me finish it out. My bill was fifty some dollars and he gave me thirty, as far as I can recall.

Q. 13, 14 or 15—what age was he when he did that?

A. That was the time he was working at the East Side Action Center.

.....

Q. (by Mr. Gerash) Now, from the standpoint of Larry's efficiency around the house in cooking and cleaning and helping with the smaller children and baby sitting, have you replaced him in any way? Have you replaced him? Have you replaced his services that he gave you?

A. No, I have not.

Q. What do you have to do?

A. I have to do it all myself now.

MR. GERASH: That is all I have, Your Honor.

* * *

(WHEREUPON, this concludes the portions designated to be transcribed by ordering counsel.)

* * *

REPORTER'S CERTIFICATE

(Omitted in printing)

AND AFTERWARDS, and on to-wit, the 15th day of November, A. D. 1974, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

+ + +

JUDGE CHARLES GOLDBERG

RUBY JONES

vs.

DOUGLAS HILDEBRANT, ET AL

C-39926

ORDER:
JURY RETURNS TO RESUME DELIBERATIONS

At this day come again the said jurors and resume deliberation.

* * *

ORDER:
JURY RETURN VERDICT
JURY DISCHARGED

At this day come again the said parties hereto, by their attorneys, respectively.

And thereupon, come again the said jurors, and on their oaths do say:

"We, the jury, find the issues for the plaintiff, Ruby Jones, and assess her damages at $1,500.00.

Signed C. GILBERT
foreman."

And the verdict being thus received and recorded, the jury is discharged and allowed to separate.

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C–39926, Ctrm. 3

RUBY Jones,
Plaintiff,

vs.

DOUGLAS HILDEBRANT, and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Defendants.

VERDICT
—filed Nov. 15, 1974

We, the jury, find the issues for the plaintiff, Ruby Jones, and assess her damages at $1,500.00.

C. E. GILBERT
FOREMAN

The above amount voted on by all members of the jury.

(THE 15th DAY OF NOVEMBER, A.D. 1974)

ORDER:
JUDGMENT ENTER

And thereupon, IT IS ORDERED BY THE COURT that Judgment enter on verdict in favor of the Plaintiff and against the Defendant in the sum of FIFTEEN HUNDRED ($1,500.00) DOLLARS, plus interest from date of filing, plus Court costs and expert witness fees.

* * *

ORDER:
PARTIES HAVE 30 DAYS TO
FILE MOTIONS

And thereupon, IT IS FURTHER ORDERED BY THE

COURT that both parties have THIRTY (30) days to file Motion for New Trial or other Motions they deem appropriate.

+ + +

(THE 15th DAY OF NOVEMBER, A.D. 1974)

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants,

C–39926

JUDGMENT
—November 15, 1974

The Court having this day ordered that judgment enter herein in favor of the Plaintiff, RUBY JONES and against the Defe, in accordance with the verdict of the Jury, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, RUBY JONES, do have and recover of and from the Defendants, DOUGLAS HILDEBRANT and BRIAN MORAN and THE CITY AND COUNTY OF DENVER, a Municipal corporation, the sum of FIFTEEN HUNDRED ($1,500.00) DOLLARS, her damages so by the jury assessed, plus interest from date of filing, plus expert witness fees, together with her costs in this behalf laid out and expended, to be taxed, and have execution therefore.

+ + +

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C–39926, Division 3

RUBY JONES,
Plaintiff,
vs.
DOUGLAS HILDEBRANT, and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

MOTION FOR NEW TRIAL
—filed Nov. 22, 1974

COMES NOW the Plaintiff, Ruby Jones by and through her attorneys Walter L. Gerash and David K. Rees, and moves this Honorable Court to grant her a new trial on the issue of damages alone.

AS GROUNDS THEREFORE, Plaintiff states that:

1. The damages awarded by the jury in the above-captioned matter were inadequate.
2. The Court erred in dismissing Plaintiff's claim brought pursuant to 42 U.S.C. §1983.
3. The Court erred in refusing to submit to the jury, Plaintiff's tendered instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

WHEREFORE, Plaintiff moves this Honorable Court to grant her a new trial on the question of damages only.

Respectfully submitted,
WALTER L. GERASH and
DAVID K. REES

David K. Rees
Attorney at Law
1100 Cherokee Street
Denver, Colorado 80204
Telephone: 893-5471

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C-39926, Division 3

RUBY JONES,
Plaintiff,
vs.
DOUGLAS HILDEBRANT, ET. AL.,
Defendants.

AMENDMENT TO MOTION FOR NEW TRIAL
—filed Dec. 9, 1974

COMES NOW the Plaintiff Ruby Jones, by and through her attorneys Walter L. Gerash and David K. Rees, and hereby amends the Motion for New Trial heretofore filed with this Court by adding the additional grounds that the net pecuniary worth rule of damages is unconstitutional and the Court erred as ammatter of law in dismissing the Plaintiff's third claim for relief.

Respectfully submitted,
WALTER L. GERASH and
DAVID K. REES

David K. Rees
Attorney for Plaintiff
1100 Cherokee Street
Denver, Colorado 80204
Telephone: 893-5471

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C-39926, Courtroom 3

RUBY JONES,
Plaintiff,

vs.

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants.

NOTICE OF APPEAL —filed Feb. 7, 1975

TO THE CLERK OF THE DISTRICT COURT:

COMES NOW the Plaintiff, Ruby Jones, by and through her attorneys, Walter L. Gerash and David K. Rees, and hereby gives notice pursuant to C.A.R. Rule 3, that she is appealing to the Supreme Court of Colorado the order entered in this case, January 9, 1975 denying Plaintiff's Motion for New Trial pursuant to C.R.C.P. Rule 59.

Dated February 7, 1975.

WALTER L. GERASH and
DAVID K. REES

David K. Rees
Attorney at Law
1100 Cherokee Street
Denver, Colorado 80204
Telephone: 893-5471

CERTIFICATE OF SERVICE
(Omitted in printing)

NO. 26828

RUBY JONES,
Plaintiff-Appellant,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants-Appellees.

OPINION— filed May 24, 1976

Appeal from the District Court of the City & County of Denver

Hon. Charles Goldberg, Judge

EN BANC — JUDGMENT AFFIRMED

Walter L. Gerash,
Attorney for Plaintiff-Appellant.

Wesley H. Doan,
Joseph A. Davis,

Attorneys for Defendants-Appellees.

MR. JUSTICE HODGES delivered the Opinion of the Court.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a $1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims

for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13–21–202, C.R.S. 1973. The third claim was premised on 42 U.S.C. §1983. It will be referred to as the §1983 claim in this opinion. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the §1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of $45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,[1] the jury returned a verdict of $1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

Plaintiff-appellant asserts that this court erred in *Pierce v. Conners*, 20 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only

[1] In accordance with our ruling in *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expneses she would have incurred in maintaining him.

compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights under Colo. Const. Art. II, §25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. *See, e.g., Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962); *Denver & R.G.R.R. v. Spencer*, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in *Herbertson* that

> "[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly reenacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction. . . ."

Also, in *Kogul*, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits of industry and disposition to help her. Based on our review of this recond, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." *See Kogul v. Sonheim, supra.*

The evidence of plaintiff's damages was vague and insub-

stantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her $30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately $1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,[2] and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

III.

Plaintiff-appellant next contends that her §1983 claim should not have been dismissed because it would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

The United States Supreme Court in *Paul v. Davis*, ___ U.S. ___, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous §1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

> "In each of these cases [e.g., the suspension of a driver's license], as a result of the state action compained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extent to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's action. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the state's laws."

[2] *Compare Kogul v. Sonheim, supra*, in which this court upheld an award for $700 for the wrongful death of a three-year old child.

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.[3]

Secondly, the plaintiff argues that although §1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. §1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that §1988 permits the incorporation of the states' non-abatement statutes[4] and wrongful death statutes[5] into §1983 actions in order to effectually implement the

[3] *Accord, Jones v. Murphy*, 392 F. Supp. 641 (E.D. Ala. 1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

[4] The following courts have held that §1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Troutman v. Johnson City*, 392 F.Supp. 556 (E.D. Tenn. 1973); *Javits v. Stevens*, 382 F.Supp. 131 (S.D. N.Y. 1974). *See also* Annot., 88 A.L.R. 2d 1153.

[5] The following cases have incorporated the states' wrongful death remedies into §1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action

policies of that legislation.[6] For example, the leading case, *Brazier v. Cherry*, *supra*, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would cripple but also from violence that would kill. However, because no express provision was established for the survival of §1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of §1988. The Supreme Court also concluded that 42 U.S.C. §1986, which provides for a limited survival action for suits brought under §1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in §1983 was indicative of Congressional intent to incorporate state remedies.

We therefore conclude that Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed.[7]

---

in their own right: *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras*, *supra*, n. 4; *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Brazier v. Cherry*, *supra*, n. 4; *Smith v. Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *Jones v. Murphy*, *supra*, n. 3; *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974); *Bailey v. Harris*, 377 F. Supp. 401 (E.D. Tenn. 1974); *Smith v. Jones*, 379 F. Supp. 201 (1973), *sum. aff'd.*, 497 F.2d 924; *Love v. Davis*, 353 F. Supp. 587 (W.D. La. 1973); *Galindo v. Brownell*, 255 F. Supp. 930 (S.D. Cal. 1966).

[6] In *Moore v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that §1988 was not intended to be a basis for an independent cause of action but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited *Brazier* with apparent approval as an example of the proper incorporation of state law under §1988. Consistently, the Court in *Moragne v. United States Marine Lines*, *infra.*, n. 10, characterized a wrongful death action was essentially remedial because it does not impose an additional duty of care on the tort-feasor.

[7] The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under §1983. *See Moor v. County of Alameda*, supra, n. 6, and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.[8] Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In *Smith v. Wickline*, *supra*, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not allow the recovery of punitive damages. In *Galindo v. Brownell*, *supra*, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.[9] Finally, in *Jones v. Murphy*, *supra*, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in §1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas [10] of the law, we do not believe that such a remedy exists with §1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.[11]

---

[8] Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Leigslature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

[9] *See also Spence v. Staras*, *supra*, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a §1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

[10] For instance, in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court began to spell out some of the parameters of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

[11] Were we to rule otherwise, this court would have to fashion a remedy for a

The plaintiff's fourth and final theory for obtaining a separate recovery under her §1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

The deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under §1983, and that a cause of action can be maintained only by the "person injured." *See Hall v. Wooten, supra,* n. 4, and *Javits v. Stevens, supra,* n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

MR. CHIEF JUSTICE PRINGLE and MR. JUSTICE GROVES dissent.

MR. JUSTICE KELLEY does not participate.

No. 26828—*Jones v. Hildebrant*

---

federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a *Moragne* wrongful death action whether such an action is limited to dependents only. *See, e.g., Hamilton v. Canal Barge Co.,* 395 F. Supp. 978 (E.D. La. 1975).

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent.

I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. §1983 (1970).

I am authorized to say that MR. JUSTICE GROVES joins in this dissent.

IN THE SUPREME COURT
OF THE STATE OF COLORADO

RUBY JONES,
Petitioner,

26828 *v.*

DOUGLAS HILDEBRANT and THE CITY AND COUNTY OF DENVER, a municipal corporation,
Respondent.

Appeal from the District Court City and County of Denver

ORDER DENYING REHEARING—June 21, 1976

On consideration of the petition of petitioner for rehearing in said cause, it is this day ordered that said petition be, and the same hereby is, denied.

By the Court. En Banc. June 21, 1976.
Mr. Justice Groves would grant.

STATE OF COLORADO, ss.

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,
To the District Court of City and County of Denver and State of Colorado, Greeting:

WHEREAS, lately in the District Court of City and County of Denver State aforesaid, in a certain cause therein pending between Ruby Jones, Plaintiff, and Douglas Hildebrant, et al., Defendants, the judgment of said District Court in said cause rendered was against the said plaintiff.

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, as an appeal from said District Court.

AND WHEREAS, at the April Term of our Supreme Court, in the year of our Lord one thousand nine hundred and seventy-six, the said cause came on to be heard before our said SUPREME COURT on the 24th day of May, A.D. 1976, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

RUBY JONES,
Plaintiff-Appellant,
No. 26828 *vs.*
DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendants-Appellees.

Appeal from the District Court City and County of Denver (C39926)

This cause having been brought to this court as an appeal to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

It is this day ordered and adjudged that the judgment of said District Court be, and the same hereby is, affirmed, and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

Now, Therefore, this cause is remanded to you, the said District Court, and in for the said City and County of Denver and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE EDWARD E. PRINGLE, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 23rd day of June, A.D., 1976.

RICHARD D. TURELLI,
Clerk Supreme Court.

By _____
Deputy.

IN THE SUPREME COURT
STATE OF COLORADO

No. 26828

RUBY JONES, *Plaintiff-Appellant,* *v.* DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, *Defendants-Appellees.*	APPEAL FROM THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER The Honorable Charles Goldberg, Judge

MOTION FOR RECALL OF MANDATE
—Filed Aug. 25, 1976

COMES NOW, the Plaintiff-Appellant, Ruby Jones, by and through her attorney, WALTER L. GERASH, P.C., and moves this Court for an Order recalling the mandate issued by this Court in the within action,

AND AS GROUNDS AND IN SUPPORT THEREOF, states as follows:

1. That this Court issued its Opinion in the within action affirming the Colorado Court of Appeals decision and rejecting the arguments raised by Plaintiff.

2. That Plaintiff duly filed a Petition for Rehearing on said decision.

3. That this Court denied Plaintiff's Petition for Rehearing.

4. That this Court has issued its mandate to the trial court directing it to act in accordance with its decision in the within action.

5. That Plaintiff now intends to appeal the decision of this Court to the United States Supreme Court.

6. That as a prerequisite for said appeal to the United

States Supreme Court, the mandate issued by this Court should be recalled.

WHEREFORE, Plaintiff prays that this Honorable Court recall its mandate issued in the within action, and for such other, further, or additional relief as the Court deems just and proper.

Dated this 25th day of August, 1976.

WALTER L. GERASH, P.C.
Suite 2317, 1700 Broadway
Denver, CO 80202
222-8574

By _____
Allan Abelman #7178
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE
(Omitted in printing)

IN THE SUPREME COURT OF THE
STATE OF COLORADO

RUBY JONES,
Plaintiff-Appellant,

26828 *v.*

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER,
a municipal corporation,

Appeal from the District Court in and for the City and County of Denver

ORDER DENYING MOTION FOR
RECALL OF MANDATE

Upon consideration of the motion for recall of mandate, it is this day ordered that said motion be, and the same hereby is, denied.

By the Court, En Banc, August 30, 1976

In the Supreme Court of the United States

No. 76-5416

RUBY JONES,
Petitioner,

v.

DOUGLAS HILDEBRANT, et al.

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Colorado.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1977

ORIGINAL COPY

NO. 76-5416

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE RESPONDENTS *IN opposition*

GEER & GOODWIN, P.C.
1700 Broadway, Suite 2309
Denver, Colorado 80290
(303) 222-2885

Edward O. Geer #3629
Robert E. Goodwin #3630

WESLEY H. DOAN, Esq.
Attorney at Law
5945 W. Mississippi Avenue
Lakewood, Colorado 80226
(303) 922-8191

WILLIAM J. CHISHOLM, Esq.
Assistant City Attorney
13th & Champa
Denver, Colorado 80204
(303) 297-3083

November 30, 1976

(i)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE RESPONDENTS

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents submit this Brief in opposition to the heretofore filed Petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of Colorado which held that the state's measure of damages concerning wrongful death governs in an action brought pursuant to 42 U.S.C. §1983 where the §1983 claim is merged into the state's wrongful death claim, when the action on which the claim is based resulted in death. The Respondents submit that in the light of prior statutory and decisional law, the Petitioner has failed to raise a substantial legal issue and certiorari should therefore be denied.

NATURE OF THE CASE

Petitioner raises issues not properly before this Court. Petitioner chose to litigate in the same state court action 1) a cause based on Colorado's Wrongful Death Statute, infra, and 2) a cause based on 42 U.S.C. §1983.

The trial court dismissed the §1983 claim, holding that the §1983 claim merged into the Wrongful Death claim. Petitioner did not appeal the dismissal of the §1983 claim. Petitioner appealed only the damages awarded on the remaining Wrongful Death claim.

However, Petitioner claimed in her damages appeal that her damages were inadequate in "that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule" (an integral part of Colorado's Wrongful Death Statute). The Colorado Supreme Court concluded that "the interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute. Admittedly, the Colorado Supreme Court went to great lengths to dispel Petitioner's claim to liability and damages under §1983.

Nevertheless, the fact remains that Petitioner pursued only an appeal to the Colorado Supreme Court contesting damages. Here again, Petitioner contests damages awarded by a state court on a state claim. The Petition for Certiorari should be denied in that the issues framed by Petitioner cannot be reviewed under the facts and circumstances before this court.

ISSUE PRESENTED FOR REVIEW

Did the Colorado Supreme Court correctly hold, in view of the absence of any provision in the civil rights statutes relating to survival, in the absence of a well-established federal common law regarding the survivorship issue and of the presence of a provision in the civil rights statutes authorizing resort to the state law regarding damages not inconsistent with the laws of the United States, that the correct measure of damages in an action pursuant to 42 U.S.C. §1983 when the alleged violation resulted in death to the injured person is the state law's measure of damage in actions for wrongful death?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Article VI, Section (2), provides:

   This constitution, and the laws of the United States which shall be made in pursuance thereof #...# shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the constitutions or laws of any state notwithstanding.

2. U.S Const., Amend. XIV, provides in part:

   nor shall any state deprive any person of life, liberty, or property without due process of law

3. 42 U.S.C. §1983, states:

   Civil action for deprivation of rights.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (R.S. Section 1979).

4. 42 U.S.C. §1988, states:

> Proceedings in vindication of civil rights.
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
> (R.S. Section 722).

5. Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203 (See Exhibit "A).

STATEMENT OF THE CASE

On February 5, 1972, DOUGLAS HILDEBRANT, a uniformed Denver police officer, shot and killed LARRY JONES, a fifteen year-old child. RUBY JONES, the child's mother, brought suit against Officer Hildebrant and the City and County of Denver, alleging wrongful death and a deprivation of civil rights under 42 U.S.C. §1983. Although it was admitted that Respondent Hildebrant intentionally shot the Petitioner's son, the Respondents answered that the police officer was attempting to apprehend a fleeing felon and while acting in self-defense used no more force than he deemed necessary.

At trial, the court dismissed the Petitioner's civil rights claim because it merged with the Petitioner's other claims under the Colorado Wrongful Death Statute which limited the Petitioner's recovery to her "net pecuniary loss" or, in other words, financial loss sustained as a result of the death of her son. Under the Colorado Wrongful Death Statute, net pecuniary loss can include damages to parents for loss of services of children during minority, as well as support and maintenance of parents from children in their declining years. The Petitioner's ability to prove only what she labels as funeral expense damages affirms that the jury found her son's contributions to be negligible. The jury could have awarded $45,000.00 for loss of services and loss of future support of the Petitioner. See C.R.S. 1973, 13-21-201 to 13-21-203. The jury returned a verdict for Petitioner for FIFTEEN HUNDRED DOLLARS ($1,500.00), from which verdict the Petitioner appealed only the damages award therein.

The Supreme Court of the State of Colorado affirmed the ruling of the trial court as to the proper measure of damages where the Section 1983 claim is merged into the State's wrongful death claim. A copy of said opinion being attached hereto and marked as Exhibit "B" is reported in ____ Colo. ____, 550 P.2d 339 (1976).

CERTIORARI SHOULD NOT BE GRANTED

The purpose behind 42 U.S.C. §1983 as recognized in Monroe v. Pape, 365 U.S. 167 (1961) was to provide a federal forum and a federal remedy for one who had been deprived of a Constitutional right by a person acting under color of state law. The federal remedy was provided because state laws prohibiting such deprivations were not being effectively enforced. In this case, Colorado laws provided a remedy for the alleged wrongful act of Respondent, the Petitioner brought suit in a state court seeking said remedy, and the state courts enforced the available remedy. Petitioner now claims she has a Constitutional right to a higher award of damages, notwithstanding the fact that she has already received the only relief envisioned by the Civil Rights Acts.

All the cases decided under the Civil Rights Acts which have involved an alleged deprivation resulting in death have universally referred to state law to determine who has standing to assert the claim and the measure of damages to which that person is entitled. By looking to state law, federal courts have developed a remedy which would otherwise be unavailable since there is no common law right to bring an action for wrongful death and consequently no common law measure of damages for injuries resulting from such death.

Since the issue presented for review is, in reality, not a matter over which there is any dispute, the Petition to this Court for a Writ of Certiorari should be denied.

A R G U M E N T

IT HAS BEEN COMMONLY HELD THAT THE STATE WRONGFUL DEATH REMEDY IS ENGRAFTED IN TOTAL ON 42 U.S.C. §1983 WHERE THE TORT RESULTS IN DEATH.

Petitioner contends that the courts have looked to state law only to determine the question of who has standing to sue under 42 U.S.C. §1983 where the tort results in death. This is clearly an erroneous interpretation of the cases which have dealt with the relationship of state and federal law in this area.

In Brazier v. Cherry, 293 F.2d 401 (C.A. 5th, 1961), cert. denied 368 U.S. 921, a widow brought a §1983 action as Administratrix of decedent's estate, for

damages sustained by decedent during his lifetime, and individually, for the value of the life of the decedent, under the Georgia Survivor and Wrongful Death statutes, respectively. The court stated the issue as follows:

> "Without a doubt Congress had the Constitutional power to spell out a comprehensive right of survival for civil rights claims. The question is therefore one of the everyday variety: has it done so by this means?
> ...
> When we examine (U.S.C.) §1988 in the dual spotlight of the major historical arm of the civil rights legislation, Monroe v. Pape, supra, and the hospitable construction to ameliorate the common law rule, there is ample basis for concluding that this statute fills the gap. Id. at P.406".

The court concluded that Congress had adopted, through 42 U.S.C. §1988, the state law on the general right of "survival" and as to the measure of damages for wrongful death. The Court continued:

> "On our analysis federal law is not suitable, i.e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal statutory framework is, in the words of the statute, "deficient in the provisions necessary to furnish suitable remedies and punish offenses against" that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies. ...And in a very real sense the utilization of local death and survival statutes does not do more than create an effective remedy".

The adoption of the state law on "survival" thus includes the total state remedy and encompasses both the issues of who has standing to bring an action and what damages are recoverable in such action.

The only courts which have discussed the issue of damages in the context of death claims under §1983 have adopted the Brazier v. Cherry view./1 It has been commonly held that a federal court, if it is going to look to the state law on wrongful death at all, must adopt the whole of that law.

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, ...but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose". (The Tungus v. Skovgaard. 358 U.S. 588 at 593 (1958))."

In James v. Murphy, 392 F. Supp. 641 (M.D. Ala., 1975) a widow brought a §1983 action against a jailer, sheriff, and other officials for her husband's death while in jail. The court held that Plaintiff had standing to sue, but dismissed her present complaint for being insufficient under Alabama law.

/1 The following cases have, pursuant to 42 U.S.C. §1988, incorporated the states' wrongful death remedies into actions brought pursuant to 42 U.S.C. §1983 to provide a suitable remedy for deprivation of civil rights: Wolfer v. Thaler, 525 F.2d 977 (5th Cir., 1976); Spence v. Staras, 507 F.2d 554 (7th Cir., 1974); Mattis v. Schnarr, 502 F.2d 588 (8th Cir., 1974); Smith v. Wickline, 396 F.Supp. 555 (W.D. Okla., 1975); Pollard v. United States, 384 F.Supp. 304 (M.D. Ala., 1974); Love v. Davis, 353 F.Supp. 587 (W.D. La., 1973); Salazar v. Dowd, 256 F.Supp. 220 (D. Colo., 1966).

> "The remedies sought by the Plaintiff (in Brazier v. Cherry) were for (a) the damages sustained by the decedent during his lifetime and (b) the damages sustained by his survivors as a result of his death. In fact, the state wherein the cause was tried - Georgia - had wrongful death-type statutes (Georgia Code §3-5-5; §105-1302), which specifically provided for those two types of damages. Thus, by virtue of §1988 these two types of wrongful death remedies were made available to a Plaintiff who sued as the personal representative of a decedent for a violation of that decedent's civil rights under §1983 in Georgia.
>
> Because of the nature of relief available under Alabama wrongful death remedies, a different result may be mandated. Mattie Mae James, in her complaint, asks for compensatory damages, as did the Plaintiff in Brazier v. Cherry, supra - damages sustained by the decedent and damages sustained by his survivors. However, the Wrongful Death Act in Alabama (Code of Alabama, Title 7, §123) does not provide for compensatory damages as do the Wrongful Death Acts in Georgia. The Alabama Wrongful Death Act provides only for punitive damages - not for compensatory or actual damages. ...The right it creates is the right of the personal representative of the decedent to act as agent, by legislative appointment for the effectuation of a legislative policy of the prevention of homicide through the deterrent value of the infliction of punitive damages. Since the Plaintiff, ..., did not claim punitive damages in her complaint, it appears that her complaint is insufficient under §1988, and the Wrongful Death Act of Alabama ...," in accord, Pollard v. United States, 384 F. Supp. 304 (M.D. Ala., 1974).

In Galindo v. Brownell, 255 F. Supp. 930 (S.D. Calif., 1966), a §1983 action was brought by a mother whose minor son was shot by a Los Angeles County deputy sheriff. The court similarly followed Brazier v. Cherry and held that §1988 of the Civil Rights Act gave the benefit of state wrongful death and survival provisions to those protected by the Act.

> "California statutes provide both for survival of actions by a decedent's executor or administrator...and for wrongful death actions by a decedent's heirs or personal representative, ... Plaintiff herein, who, judging from her complaint, seeks only to maintain a wrongful death action for any pecuniary loss sustained by loss of her son's society, comfort, attention, services and companionship, has standing as an heir of the decedent to sue for damages for his wrongful death".

Defendant's Motion to Dismiss was overruled and at the subsequent trial the state measure of damages was to be applied.

Perkins v. Salafia, 338 F. Supp. 1325 (D. Conn., 1972) also involved a suit by a mother for the shooting of her son by state police officers. The court there followed Connecticut law which did not provide a wrongful death remedy for survivors but only allowed the personal representative to assert the action which had accrued to the decedent. Therefore, the Plaintiff mother's action for compensation as to her losses was dismissed.

Finally, Spence v. Staras, 507 F.2d 554 (C.A. 7th, 1974) involved a dual action by a mother for (1) the damages sustained by her son as a result of pain and suffering prior to his death and (2) for pecuniary losses suffered by her as a result of his wrongful death while a patient in a state mental hospital. The first claim was actionable under Illinois' Survival Statute and the second under the Wrongful Death Statute.

> "In the present case, the complaint contains a general prayer for actual damages, as well as an allegation of pecuniary loss to the plaintiff as decedent's next kin. Although the plaintiff may have difficulty, as the district court noted, in proving pecuniary loss due to the death of her non-verbal, mentally ill son, the plaintiff may well be able to prove actual damages resulting from the decedent's pain and suffering prior to his death".

The law is well settled that a §1983 claim may survive the person whose Constitutional rights have been violated despite the fact that the Civil Rights Acts, standing alone, are deficient in this regard and that there is no federal wrongful death statute. It is equally well settled that the law of the forum state is available to fill the void in federal law by supplying a remedy to survivors. The federal courts have unanimously adopted whatever remedy was available in the forum state to vindicate a deprivation of civil rights resulting in death under the mandate of 42 U.S.C. §1988.

> "With regard to any deficiency in the federal law in this regard, §1988 of Title 42 U.S.C. provides that the laws of the forum state shall apply where necessary to provide a suitable remedy for enforcement of the Federal Civil Rights Statutes. It has accordingly been held that, pursuant to...§1988, the wrongful death statute of the forum state would apply in a federal action seeking to enforce rights secured by §1983". Bailey v. Harris, 377 F. Supp. 401 (E.D. Tenn., 1974).

Thus, the Colorado Supreme Court followed the unanimous precedent of federal courts in holding that the Colorado measure of damages for wrongful death would apply in a Civil Rights action based upon a wrongful death.

Similarly, where a §1983 claim has been based upon death, no court has held that a measure of damages different from that existing under the forum state's law would apply. Therein lies the distinction between the cases discussed above and the cases discussed by the Petitioner. Petitioner relies on cases which are inapposite to the issue she raises. Petitioner asserts that there is a federal common law of damages, but none of the cases she cites makes this statement in the context of a wrongful death case. Basista v. Weir, 340 F.2d 74 (C.A. 3rd, 1965) dealt with whether federal or state common law applied in a case where the injured party was seeking punitive damages, but was unable to prove actual damage. The

court held that federal common law would apply. The situation before this court is different. The only issue in cases of this type is whether a state statute will be followed or whether there will be no recovery at all. There is no federal common law allowing recovery for wrongful death; indeed, such a remedy did not exist at common law. The federal courts have interpreted that 42 U.S.C. §1988 encompasses the wrongful death statutes of the various states.

The other cases which the Petitioner discusses as addressing the issue of damages, to-wit: Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo., 1967); Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa., 1973) can be similarly distinguished. Sullivan v. Little Hunting Park was a §1982 claim under which Plaintiff alleged that the Defendants interfered with his right to lease his house by refusing to approve his assignment of his membership share in the Park to a black family. Rhoads v. Horvat was an action involving a illegal arrest, (the damages were reduced by the court in that case as being excessive), and Farber v. Rizzo was a civil contempt action against Philadelphia police who violated the terms of a Temporary Restraining Order.

Also implicit in the Petitioner's Brief is the theory that the Petitioner was denied compensation for the loss of her civil rights. The Petitioner's statement of the case, however, indicates that the alleged deprivations are really those of her son. The federal courts have consistently held that one does not have standing to sue for the deprivation of another's rights under 42 U.S.C. §1983 since a cause of action can only be maintained by the "person injured". Hall v. Wooten, 506 F.2d 564 (6th Cir., 1974); Javits v. Stevens, 382 F. Supp. 131 (S.D. N.Y., 1974).

C O N C L U S I O N

The Colorado Supreme Court effectively enforced the only remedy available to the Petitioner in any forum. If she had brought the action in the District Court for the District of Colorado, that court, under §1988, and all of the cases relating to wrongful death decided thereunder, would have been obligated to apply to the Colorado rule of damages as to wrongful death. This is so because the Civil Rights Acts are deficient in not providing a remedy where the alleged Constitutional deprivation results in death and there is no federal measure of damages for wrongful death absent a statute. Consequently, if there is to be any remedy for such deprivations, it must be provided by the law of the forum state. Colorado provided the only remedy which the federal courts have recognized as being available to plaintiffs in actions such as the case at bar. Therefore, in view of the fact that courts have been unanimous in their application of state law to such cases, a Writ of Certiorari should not issue.

Respectfully submitted,

GEER & GOODWIN, P.C.

By: Edward O. Geer

Attorneys for Respondents
1700 Broadway, Suite 2309
Denver, Colorado 80290
(303) 222-2885

Edward O. Geer #3629
Robert E. Goodwin #3630

WESLEY H. DOAN, Esq.
Attorney at Law
5945 W. Mississippi Avenue
Lakewood, Colorado 80226
(303) 922-8191

WILLIAM J. CHISHOLM, Esq.
Assistant City Attorney
13th & Champa Streets
Denver, Colorado 80204
(303) 297-3083

APPENDIX "A"

PART 2

DAMAGES FOR DEATH BY NEGLIGENCE

13-21-201. Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution.

Source: G. L. § 877; G. S. § 1030; L. 07, p. 296, § 1; R. S. 08, § 2056; C. L. § 6302; CSA, C. 50, § 1; L. 51, p. 338, § 1; CRS 53, § 41-1-1; C.R.S. 1963, § 41-1-1.

13-21-202. Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

Source: G. L. § 878; G. S. § 1031; R. S. 08, § 2057; C. L. § 6303; CSA, C. 50, § 2; CRS 53, § 41-1-2; C.R.S. 1963, § 41-1-2.

APPENDIX "A"

13-21-203. Limitation on damages. (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default.

Source: G. L. § 879; G. S. § 1032; R. S. 08, § 2058; C. L. § 6304; CSA, C. 50, § 3; L. 51, p. 339, § 2; CRS 53, § 41-1-3; L. 57, p. 338, § § 1, 2; C.R.S. 1963, § 41-1-3; L. 67, p. 481, § 1; L. 69, pp. 329, 330, § § 1, 3.

2 (a)

APPENDIX "B"

golf facilities mentioned above, the district offers a recreation program with classes in a wide variety of sports as well as art activities. Testimony offered on behalf of the city indicated that, at the time the petition was filed, the only recreation facilities furnished by the city within its corporate limits were several parks with two tennis courts and some playground equipment. While city council did adopt, five months *after* the petition was filed, a master plan for the development of recreation programs, the record reflects that these plans could not be implemented until well after the one year statutory time limit. See section 89-16-3(1)(c).

The city contends that our holding in *City Council of Greenwood Village v. Board of Directors of South Suburban Metropolitan Recreation and Park District*, 181 Colo. 334, 509 P.2d 317 (1973), mandates the granting of its exclusion petition. We disagree. In *Greenwood* we faced a distinctly different situation. We affirmed the trial court's exclusion order in that case after determining that it did not matter whether the municipality contracted with others to provide recreation services or provided those services themselves. In significant contrast to the present case, Greenwood Village sponsored and provided by contract a full array of recreation services, facilities and programs. Unlike the case now before us, the municipality was able to offer services comparable in both quantity and quality to those offered by the recreation district.

We further note that this case does not fall within the purview of the exclusion statute's express legislative purpose: to avoid the overlapping of services and double taxation. 1967 Perm.Supp., C.R.S.1963, 89-16-9.[3]

[3] The trial court's findings and conclusions, moreover, are amply supported by the record, are not arbitrary and capricious, and therefore require affirmation by this Court. 1965 Perm.Supp. C.R.S.1963, 89-16-3(1)(d).

In view of our determination that the petition was properly denied, we need not address the city's contention that the trial court erred in not ordering disposition of the district's assets.

Judgment affirmed.

KELLEY, J., does not participate.

Ruby JONES, Plaintiff-Appellant,
v.
Douglas HILDEBRANT, and the City and County of Denver, a Municipal Corporation, Defendants-Appellees.
No. 26828.

Supreme Court of Colorado, En Banc.
May 24, 1976.
Rehearing Denied June 21, 1976.

Alleging battery, negligence, and a violation of civil rights, mother filed action against police officer and city and county, seeking to recover damages for the wrongful death of her 15-year-old son. The District Court, City & County of Denver, Charles Goldberg, J., awarded plaintiff $1,500, and she appealed solely on the damages issue. The Supreme Court, Hodges, J., held that plaintiff's damages under the wrongful death statute were not unconstitutionally restricted by the net pecuniary loss rule; that the jury's verdict was not inadequate as a matter of law under the evidence presented; that since the state allowed plaintiff to bring suit, she was not deprived of any of her civil rights without due process of law; that while Colorado's

3. Now section 32-1-301, C.R.S.1973.

( )

wrongful death remedy would be engrafted into an action under the Civil Rights Act of 1871 if brought in federal court, since the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the federal civil rights claim should be dismissed; that since the allowable damages were such an integral part of the right to bring a wrongful death remedy, the Colorado law on damages would also apply; that a federal wrongful death remedy does not impliedly exist in the Civil Rights Act of 1871, independent of state wrongful death remedies; and that plaintiff could not sue for the deprivation of her son's rights under the federal Civil Rights Act.

Judgment affirmed.

Pringle, C. J., filed a dissenting opinion in which Groves, J., joined.

1. Death ⇐95(3)

Mother's damages for the wrongful death of her teenage son were not unconstitutionally restricted under the wrongful death statute by the net pecuniary loss rule. C.R.S. '73, 13-21-202; Const. art. 2, § 25; U.S.C.A.Const. Amend. 14.

2. Death ⇐89

The net pecuniary loss rule, relative to recovery under the Colorado wrongful death statute, does not allow for compensation of parental grief. C.R.S. '73, 13-21-202.

3. Death ⇐103(4)

Jury verdict of $1,500 for the wrongful death of plaintiff's 15-year-old son was not inadequate as a matter of law, where, inter alia, evidence of plaintiff's damages was vague and insubstantial. C.R.S. '73, 13-21-202.

4. Constitutional Law ⇐305(2)

Right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐305(2)

Since Colorado allowed mother to bring suit for the wrongful death of her teenage son, she was not deprived of any of her civil rights without due process of law. C.R.S. '73, 13-21-202; 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

6. Death ⇐8
Dismissal and Nonsuit ⇐53(1)

While Colorado's wrongful death remedy would be engrafted into an action under the Civil Rights Act of 1871 if brought in a federal court, since the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the federal civil rights claim should be dismissed; furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, the state's law on damages would also apply. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

7. Civil Rights ⇐12.3

A federal wrongful death remedy does not impliedly exist in the Civil Rights Act of 1871, independent of state wrongful death remedies. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐13.6

One may not sue for the deprivation of another's rights under federal civil rights statute creating a cause of action against persons whose misconduct under color of state law violates the constitutional rights of another; such a cause of action can be maintained only by the "person injured." 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13.6

Mother could not sue in her own right for the deprivation of her deceased son's rights under the Civil Rights Act of 1871, apart from her remedy under state wrongful death cause of action. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

10. Civil Rights ⇐13.6

The interest protected by the Civil Rights Act of 1871, which created a federal cause of action against persons whose misconduct under color of state law violates the constitutional rights of another, are adequately vindicated when actions are brought by the injured parties themselves, or at their death by those designated in the Colorado wrongful death statute. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

3(b)

Walter L. Gerash, Denver, for plaintiff-appellant.

Wesley H. Doan, Joseph A. Davies, Lakewood, for defendants-appellees.

HODGES, Justice.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a $1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13-21-202, C.R.S.1973. The third claim was premised on 42 U.S.C. § 1983. It will be referred to as the § 1983 claim in this opinion. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the § 1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of $45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,[1] the jury returned a verdict of $1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her § 1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

[1] Plaintiff-appellant assert that this court erred in *Pierce v. Connors*, 29 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights

1. In accordance with our ruling in *Herberton v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expenses she would have incurred in maintaining him.

3(b)

under Colo.Const. Art. II, § 25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. *See e. g., Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962); *Denver & R. G. R. R. v. Spencer*, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in *Herbertson* that

> "[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction. . . . ."

[2] Also, in *Kogul*, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

[3] The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits of industry and disposition to help her. Based on our review of this record, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." *See Kogul v. Sonheim, supra.*

The evidence of plaintiff's damages was vague and insubstantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her $30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately $1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,[2] and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

III.

Plaintiff-appellant next contends that her § 1983 claim should not have been dismissed because it would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

[4,5] The United States Supreme Court in *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous

2. *Compare Kogul v. Sunkrom, supra*, in which this court upheld an award for $700 for the wrongful death of a three-year old child.

4 (b)

§ 1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

> "In each of these cases [e. g., the suspension of a driver's license], as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws."

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.[3]

Secondly, the plaintiff argues that although § 1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. § 1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that § 1988 permits the incorporation of the states' non-abatement statutes[4] and wrongful death statutes[5] into § 1983 actions in

3. *Accord, James v. Murphy*, 392 F.Supp. 641 (E.D.Ala.1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

4. The following courts have held that § 1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Troutman v. Johnson City*, 392 F.Supp. 556 (E.D.Tenn.1975); *Javits v. Stevens*, 382 F.Supp. 131 (S.D.N.Y.1974). *See also* Annot., 58 A.L.R.2d 1153.

5. The following cases have incorporated the states' wrongful death remedies into § 1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action in their own right: *Waller v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras, supra*, n. 4; *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Brazier v. Cherry, supra*, n. 4; *Smith v. Wickline*, 390 F.Supp. 555 (W.D.Okla.1975); *Jones v. Murphy, supra*, n. 3; *Pollard v. United States*, 384 F.Supp. 394 (M.D.Ala. 1974); *Bailey v. Harris*, 377 F.Supp. 401 (E.D.Tenn.1974); *Smith v. Jones*, 370 F. Supp. 203 (1973), *sum. aff'd.*, 497 F.2d 924;

5 (b)

order to effectually implement the policies of that legislation.[8] For example, the leading case, *Brazier v. Cherry*, *supra*, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would cripple but also from violence that would kill. However, because no express provision was established for the survival of § 1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of § 1988. The Supreme Court also concluded that 42 U.S.C. § 1986, which provides for a limited survival action for suits brought under § 1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in § 1983 was indicative of Congressional intent to incorporate state remedies.

[6] We therefore conclude that Colorado's wrongful death remedy would be engrafted into a § 1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the § 1983 claim should be dismissed.[7]

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.[8] Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In *Smith v. Wickline*, *supra*, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not allow the recovery of punitive damages. In *Galindo v. Brownell*, *supra*, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.[9] Finally, in *Jones v. Murphy*,

Love v. Davis, 353 F.Supp. 587 (W.D.La. 1973); *Galindo v. Brownell*, 255 F.Supp. 930 (E.D.Cal.1966).

6. In *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that § 1988 was not intended to be a basis for an independent cause of action, but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited *Brazier* with apparent approval as an example of the proper incorporation of state law under § 1988. Consistently, the Court in *Moragne v. United States Marine Lines*, *infra*, n. 10, characterized a wrongful death action as essentially remedial because it does not impose an additional duty of care on the tort-feasor.

7. The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under § 1983. *See Moor v. County of Alameda*, supra, n. 6, and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

8. Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

9. *See also Spence v. Staras*, *supra*, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a § 1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

10. For instance, in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court began to spell out some of the para-

supra, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

[7] Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in § 1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas[10] of the law, we do not believe that such a remedy exists with § 1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.[11]

The plaintiff's fourth and final theory for obtaining a separate recovery under her § 1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

[8,9] These deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under § 1983, and that a cause of action can be maintained only by the "person injured." *See Hall v. Wooten*, *supra*, n. 4, and *Jones v. Stevens*, *supra*, n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

[10] Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that § 1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by § 1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

PRINGLE, C. J., and GROVES, J., dissent.

KELLEY, J., does not participate.

PRINGLE, Chief Justice (dissenting):

I respectfully dissent.

I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

11. Were we to rule otherwise, this court would have to fashion a remedy for a federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a *Moragne* wrongful death action whether such an action is limited to dependents only. *See, e. g., Hamilton v. Canal Barge Co.*, 395 F.Supp. 978 (E.D.La. 1975).

6(b)

6(b)

7(b)

ure of damages for wrongful death applies to actions founded upon 42 U.S.C. § 1983 (1970).

I am authorized to say that Mr. Justice GROVES joins in this dissent.

R. M., Petitioner,

v.

The DISTRICT COURT IN AND FOR the TENTH JUDICIAL DISTRICT, State of Colorado, and the Honorable Richard Robb, one of the District Judges in and for the Tenth Judicial District, State of Colorado, Respondents.

No. 27111.

Supreme Court of Colorado,
En Banc.
June 1, 1976.

Juvenile instituted original proceeding for purpose of challenging jurisdiction of respondent district court in a juvenile delinquency proceeding. The Supreme Court, Kelley, J., held that statute mandated that a delinquency petition, which had been filed while juvenile was committed to state hospital under a previous court order, be dismissed ab initio without prejudice, that district court may take evidence regarding a child's mental condition as early as the filing of delinquency petition relating to such child and that doctor's report was not sufficient, as a matter of law, to sustain order denying juvenile's motions for appointment of psychiatrist to examine juvenile and for suspension of adjudicatory hearing on delinquency petition.

Rule made absolute as to issue relating to dismissal of delinquency petition, and discharged as to remaining issues.

1. Statutes ⇐235

Provisions of children's code should be liberally construed to accomplish the purpose and to effectuate intent of legislature. C.R.S. '73, 19-1-102(2).

2. Infants ⇐16.5

Purpose of statute pertaining to procedure to be followed in delinquency proceeding if it appears that child may be mentally ill or developmentally disabled is to protect mentally ill or mentally deficient juvenile from having to respond to delinquency petitions in an adversary setting and to provide an affirmative avenue of relief through medical treatment for such juveniles as an alternative to the ordinary juvenile delinquency proceeding. C.R.S. '73, 19-3-107.

3. Infants ⇐16.4

Statute, which provides in effect that the court shall dismiss the original delinquency petition "when a child is committed to a state hospital or state home and training school," mandated that a delinquency petition, which had been filed while juvenile was committed to state hospital under a previous court order, be dismissed ab initio without prejudice to a filing of a new petition at time at which juvenile was no longer committed. C.R.S. '73, 19-3-107(3), 27-9-105.

4. Infants ⇐16.9

District court may take evidence regarding a child's mental condition as early as the filing of delinquency petition relating to such child. C.R.S. '73, 19-3-107(1), 27-9-105.

5. Infants ⇐16.9

Doctor's report, which was prepared while juvenile was committed under short-term involuntary hospitalization order and which did not specifically offer a diagnosis of juvenile's mental condition and was, at most, equivocal as to juvenile's state of mind, was not sufficient as a matter of law to sustain order denying juvenile's motion for appointment of psychiatrist to examine juvenile and for suspension of adjudicatory hearing on delinquency petition. C.R.S. '73, 19-3-107(1-4), (1)(a).

8b

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE PETITIONER

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Colorado (No. 26828) is reported at 550 P.2d 339.

JURISDICTION

The opinion of the Colorado Supreme Court was entered on May 24, 1976 (A. 43). A timely petition for

rehearing was filed, and was denied by the Colorado Supreme Court on June 21, 1976 (A. 52). A timely petition for Writ of Certiorari was granted on January 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Where the black mother of a 15-year-old child, who was intentionally shot and killed by a white policeman acting under color of state law, brings a suit in state court pursuant to 42 U.S.C. §1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U.S.C. §1983?

Constitutional and Statutory Provisions Involved

U.S. Const., Article VI, Section (2), provides:

This constitution, and the laws of the United States which shall be made in pursuance thereof # . . . # shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the constitutions or laws of any state notwithstanding.

U.S. Const., Amend. XIV, provides in part:

* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *

42 U.S.C. §1983, states:

Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (R.S. §1979).

42 U.S.C. §1988, states:

Proceedings in vindication of civil rights
The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. §722).

Colo. Rev. Stat. Ann. (1973).

"*13-20-101. What actions survive.* (1) All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties

are claimed; and in tort actions based upon personal injury, the damages recoverable after the death of the person on whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death. An action under this section shall not preclude an action for wrongful death under part 2 of article 21 of this title.

(2) Any action under this section may be brought, or the court on motion may allow, the action to be continued by or against the personal representative of the deceased. Such action shall be deemed a continuing one, and to have accrued to or against such representative at the time it would have accrued to or against the deceased, if he had survived. If such action is continued against the personal representative of the deceased, a notice shall be served on him as in cases of original process, but no judgment shall be collectible against a deceased person's estate or personal representative unless a claim shall have been filed within the time and in the manner required for other claims against an estate."

* * *

"*13-21-201. Damages for death.* (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance

operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

* * *

"*13-21-202. Action notwithstanding death.* When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if

death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

* * *

"*13-21-203. Limitation on damages.* (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."

STATEMENT OF THE CASE

On October 15, 1973, the plaintiff, Ruby Jones, filed a Complaint in the District Court in and for the City and County of Denver against Douglas Hildebrant, Brian Moran,[1] and the City and County of Denver (hereinafter "City"). She alleged that on February 5, 1972, Douglas Hildebrant (hereinafter "Hildebrant"), a Denver police officer, in uniform and on duty, while acting within the scope of his employment and under the color of state law, intentionally shot her 15-year-old son, Larry Jones, in the back of the head, causing him to die.

Plaintiff stated three causes of action: battery, negligence, and deprivation of civil rights (42 U.S.C. §1983).[2] She prayed for compensatory damages of $1,500,000 and exemplary damages of $500,000 (A. 3).

The defendants, Hildebrant and the City, filed an answer in which they admitted that Hildebrant was a Denver police officer acting within the scope of his employment and that on February 5, 1972, he shot Larry Jones. Nevertheless, the defendants alleged that this homicide was justified on the grounds of self defense and on the ground that Hildebrant was in pursuit of a fleeing felon (A. 5-7).

On February 13, 1974, the defendant filed a Motion for Reduction of Prayer of Complaint (A. 8) on the

---

[1] Officer Moran was subsequently dismissed from the lawsuit upon plaintiff's motion. This was accomplished through the filing of an Amended Complaint.

[2] A Fourth Claim for Relief based on a conspiracy between Officer Moran and Officer Hildebrant was later dismissed when Officer Moran was dismissed from the lawsuit.

basis that under Colorado law, in a wrongful death action, the maximum amount recoverable was $45,000, *Colo. Rev. Stat. Ann.*, §13-21-203, (1973). Plaintiff admitted that this monetary limitation applied to the Colorado statutes, but asserted that the Colorado law could not restrict plaintiff's claim brought under 42 U.S.C. §1983. Nevertheless, the defendants' motion was granted.

On November 11, 1974, the trial began (R. 37). On November 14, 1974, at the close of the evidence, the defendants in chambers moved to strike plaintiff's claim for exemplary damages and further moved to strike plaintiff's claim brought under 42 U.S.C. §1983 on the grounds that it was "redundant and repetitive" with plaintiff's other causes of action (A. 25). This motion was granted (A. 31). The following day, the jury returned a verdict finding the issues for the plaintiff and awarding her damages in the sum of $1,500.

Plaintiff subsequently filed her Motion for New Trial (R. 87) and Notice of Appeal (R. 102), and appealed to the Colorado Supreme Court, which court affirmed the judgment of the trial court by a vote of 4-2, Chief Justice Pringle and Justice Groves dissenting.[3] (A. 51).

Plaintiff's Petition for Rehearing was denied (R. 271). Subsequently, this Court granted *certiorari* (A. 58).

[3] Justice Kelly did not participate.

SUMMARY OF THE ARGUMENT

In affirming the decision of the trial court, the Colorado Supreme Court held that the measure of damages in a §1983 action could be controlled by state law, where the violation of constitutional rights resulted in death. This argument ignored the purposes of the Civil Rights Acts. The legislative history clearly shows that the Acts were designed to provide federal control over state activities. In this way, the federal government became able to enforce federal rights against persons acting under color of state law.

This control manifested itself by providing a federal remedy to protect federal rights. This remedy was designed to be *supplementary* to any state remedy, and therefore, cannot be controlled by a state law of damages. This is true whether the action is brought in federal or state courts. This federal remedy, which is authorized by 42 U.S.C. §1988 and is now firmly embedded in the federal common law, may utilize state law where necessary, but may never do so to restrict the purposes of the statute. Rather, where state law is inconsistent with the Civil Rights Acts, the federal, not the state law controls.

The fact that Ruby Jones could use state law as a basis of standing is similarly irrelevant. State law may only be used to fill gaps in federal law. Since there is no gap in the federal common law of damages, state law is unavailable. Moreover, Ruby Jones had standing to bring the suit under the federal common law. Consequently, the state restrictions on damages cannot possibly restrict her federal remedy.

ARGUMENT

I.

THE CREATION OF THE RIGHT: THE CONGRESSIONAL INTENT INDICATES THAT §1983 WAS INTENDED TO CONTROL STATE ACTIVITY BY PROVIDING A FEDERAL REMEDY.

In its decision below, the Colorado Supreme Court held, *inter alia*, that the Colorado measure of damages is "engrafted" onto an action brought for deprivation of civil rights under 42 U.S.C. §1983, at least where the unconstitutional activity resulted in death. An analysis of the legislative history behind §1983 shows the flaws in this argument, for it is clear that §1983 was intended to control state activity. Moreover, this control was to be exercised by providing a federal remedy for the violation of federal rights.

After the Civil War and slavery ended in 1865, a wave of murder and assault against blacks and Union sympathizers occurred in the South. In response, President Grant sent a message to Congress asking for federal legislation to curb these acts of violence. Congress, in return, passed the Ku Klux Klan Act of 1871, 17 Stat. 13, Section 1, which is now codified as 42 U.S.C. §1983. *District of Columbia v. Carter*, 409 U.S. 718, 425-426 (1973). This act, along with the passage of the Fourteenth Amendment, made a major change in the nature of federal-state relations by giving the federal government added control over state activity. As a result of this post-Civil War legislation, "[T]he role of the Federal Government as a guarantor of basic federal rights against state power was clearly

established." *Mitchum v. Foster*, 407 U.S. 225 (1972).[4] One scholar has summarized this new exercise of federal power noting that, "[T]he constitutional rights and their implementing components establish a nationwide floor below which state experimentation will not be permitted to fall." Monaghan, *Constitutional Common Law*, 89 Harv.L.Rev. 1, at 19 (1975).

This federal control was multi-faceted. First, it provided a vehicle through which certain state laws and practices could be overridden. *Monroe v. Pape*, 365 U.S. 167, at 173 (1961). In this regard, it provided a federal forum to insure that those whose constitutional rights were being violated would have a vehicle to redress their grievance. *District of Columbia v. Carter, supra*, at 427.

Secondly, this control was exercised by providing federal remedies for the violation of federal rights. *Monroe v. Pape, supra*, at 173-174; *McNeese v. Board of Education*, 373 U.S. 668 (1963). Moreover, these remedies were intended to be *supplementary* to any state remedy. As Justice Douglas noted in *Monroe v. Pape, supra*, the Civil Rights Acts were passed, in part to provide a federal remedy where the state remedy is inadequate. Justice Harlan in his concurring opinion expanded on this point. He wrote:

> The statute becomes more than a jurisdictional provision only if one attributes to the enacting

---

[4] Congressman Stoughton emphasized this federal control, stating:

> The authority thus confined [by the Fourteenth Amendment] is subject to no restrictions or limitations. It is for Congress to determine what legislation is appropriate, and its decision is binding upon every other department of the Government. [*Congressional Globe*, 42d Congress, p. 32].

> legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. [*Id.* at 196].

Justice Harlan went on to point out that he favored this view as a "common-sense matter", because it was "more consistent with the flavor of the legislative history". *Ibid.*[5] Then in a footnote, he stated:

> There will be many cases in which the relief provided by the state to the victim of a use of state power . . . will be far less than what Congress may have thought would be a fair reimbursement for deprivation of a constitutional right. [*Ibid.*].

The vehicle through which these federal remedies were implemented is 42 U.S.C. §1988. Under §1988, both federal and state law may be used, if necessary, to

---

[5] Justice Harlan noted that Civil Rights Act cases may be brought in federal court. While this is of course true, a plaintiff may under the theory of concurrent jurisdiction bring the case in state court. *Holland v. Perini*, 512 F.2d 93 (10th Cir., 1975), *cert. denied*, 423 U.S. 994; *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir., 1972); Cf. *Testa v. Katt*, 330 U.S. 386 (1947); *Grubb v. Public Utilities Commission*, 281 U.S. 470 (1930); *Robb v. Connally*, 111 U.S. 624 (1884); *Claflin v. Houseman*, 93 U.S. 130 (1876). In fact, prior to 1875, the federal courts had no general, federal-question jurisdiction. *Bunnon v. Board of Governors*, 413 F. Supp. 1274 (1976). The choice of a state forum to enforce federally protected constitutional rights is salutory. With the proliferation of Title VII cases and the press of other administrative matters in the federal courts, it is particularly beneficial to permit state courts to enforce federal rights, thus relieving the burden on the federal courts.

provide a plaintiff an adequate remedy. Yet this court has stated emphatically that although state sources may be used, the remedy is still federal.

In *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969), this court stated:

> This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier v. Cherry*, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need where a federal right is impaired.

Similarly, in *Basista v. Weir*, 340 F.2d 74 (3d Cir., 1965), the Third Circuit upheld the award of $1,500 exemplary damages to a plaintiff who had obtained a judgment pursuant to 42 U.S.C. §1983 as a result of being beaten and falsely arrested by the police. In discussing the measure of damages, the court held: "We are of the opinion, as we have stated, that the federal common law of damages commands the issue in the case at bar." *Id.* at 87. *Accord, Harrison v. United Transportation Union*, 530 F.2d 558, (4th Cir., 1975); *Martin v. Duffie*, 463 F.2d 464 (10th Cir., 1972); *Seaton v. Sky Realty Co.*, 491 F.2d 634, (7th Cir., 1974); *Gaston v. Gibson*, 328 F. Supp. 2 (E.D. Tenn., 1969). Obviously, as the Civil Rights Acts were intended to supplement state law, they cannot be restricted by the bounds of that law.

II.

THE FEDERAL REMEDY IS UNIFORM

The need to utilize federal common law in §1983 actions is evident since Congress intended the Civil Rights Acts to be applied uniformly in all state and federal forums. As the Court in *Basista v. Weir, supra,* held:

> We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. [*Id.* at 86].

The court then added "Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended." *Ibid.*

The necessity for uniformity has been referred to in many cases. For example, in *Caperci v. Huntoon,* 397 F.2d 799 (1st Cir., 1968), *cert. denied,* 393 U.S. 940 (1968), the court permitted the plaintiff to obtain exemplary damages in a §1983 action even though Massachusetts did not provide such damages. The court stated, "[W]e believe, on balance, that the remedial purpose of the Act is better served by not permitting local variation allowing dimunition of the amount of recovery." *Id.* at 801. Similarly, in *Shaw v. Garrison,* 545 F.2d 980 (5th Cir., 1977), the Fifth Circuit Court of Appeals refused to dismiss a §1983 action even though under local law the action would have

terminated with the death of the plaintiff. Rather, the court in order to provide a uniform remedy, utilized federal common law and permitted the action to survive.

These cases clearly indicate that the federal common law affords the same remedy to all people whose constitutional rights have been violated. Federal constitutional rights as protected by the Civil Rights Acts should not be restricted by the vagaries and vicissitudes of fifty different states. This would provide different remedies for the violation of the same constitutional rights in different parts of the country and would certainly decree that Mrs. Jones' constitutional rights would not be fully protected.

III.

THE DECISION OF THE COLORADO SUPREME COURT IS ERRONEOUS SINCE IT MISAPPREHENDED THE FEDERAL LAW OF STANDING UNDER THE FEDERAL CIVIL RIGHTS ACT.

A. Ruby Jones has standing to sue independent of state law.

In affirming the judgment of the trial court, the Colorado Supreme Court held that in order for Ruby Jones to bring a §1983 action for the death of her son, she was forced to rely on the Colorado Wrongful Death Statute, *Colo. Rev. Stat. Ann.* §13-21-202. It held the result of this to be that:

> Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in federal

> court. However, because the instant suit was brought in a state court, the trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed.
>
> Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law of damages should also apply. [*Jones v. Hildebrant*, 550 P.2d 339, 344 (Colo., 1976), *cert. granted* January 17, 1977.]

In so ruling, the Colorado Supreme Court erred in several respects.

While it is true that state law may be used to determine standing, *Moore v. County of Alameda*, 411 U.S. 693, 702-703 (1973); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir., 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir., 1961), it is not true that a plaintiff does not have standing to sue absent a state statute. Rather, federal common law gives Ruby Jones standing to sue.

The Congressional intent in passing the Civil Rights Acts indicates that Mrs. Jones has standing to sue, for there can be no question that §1983 was meant to apply to death cases. President Grant's message to Congress referred specifically to the loss of life which prompted him to ask for federal legislation. *Cong. Globe*, 42d Cong., 1st Sess., p. 244. The floor debates on the bill frequently reflected this theme. For example, Senator Lowe of Kansas stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper correction. [*Id.* at 374].

Similarly, Congressman Butler, in trying to convince his colleagues that municipalities should be liable under the Civil Rights Acts, stated:

> This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed as a remedy. [Cong. Globe, 42d Cong., 1st Sess. at 807].

Given this background, it is not surprising that the courts have uniformly held that Congress intended the Civil Rights Acts to apply where the deprivation of constitutional right resulted in death. See, *e.g.*, *Brazier v. Cherry*, *supra*; *Hall v. Wooten*, 506 F.2d 564 (6th Cir., 1974). See also, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Brazier v. Cherry*, supra, the court held:

> [I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple. [*Id.* at 404].

The above analysis indicates that the instant case falls squarely within the purview of 42 U.S.C. §1983. Ruby Jones' son, Larry, a black 15-year-old boy, was shot and killed, without justification or excuse, by a uniformed police officer acting intentionally and under the color of state law. This is precisely the sort of outrage for which Congress sought to create a deterrent;

this is precisely the sort of wrong for which Congress provided a remedy.

Given the clear Congressional intent to apply §1983 actions to death cases, it is incumbent upon this Court to insure that the appropriate relief is available. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). As Mr. Justice Black, speaking for the Court in *Bell v. Hood*, 327 U.S. 678, 684 (1946) stated:

> [W]here federally protected rights have been involved, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to right the wrong done.[6]

Accord, Basista v. Weir, supra, at 87.

With this mandate in mind, it is not surprising that courts have in the past used federal common law for the purpose of standing in §1983 actions. For example, in *Scheuer v. Rhodes, supra,* this Court, without referring to state law, held that the plaintiffs had stated a cause of action for the death of their children.

---

[6] This doctrine can be traced back at least as far as *Marbury v. Madison*, 5 U.S. (1 Cranch.) 160, 162-163 (1803), where the Court held:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> * * *
>
> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellative, if the laws furnish no remedy for the violation of a vested right.

Similarly, in *Davis v. Johnson*, 138 F. Supp. 575 (N.D. Ill., 1955), a case decided prior to *Brazier, supra,* the Court merely construed the Civil Rights Acts so as to permit a suit by the administratrix of the decedent's estate. Most recently, in *Shaw v. Garrison, supra,* the Court of Appeals for the Fifth Circuit held that although the action would have died with the death of the plaintiff (after suit had been brought) under the Louisiana survivorship statute, the Court would not apply that law to a civil rights action.

Ruby Jones additionally has standing to bring this suit since when the defendant, Douglas Hildebrant, shot Larry Jones, *he deprived Mrs. Jones of her rights without due process of law.* The case law makes this argument clear. In *Mattis v. Schnarr, supra,* the Court held:

> We believe that "parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law – a fundamental legal right." [*Id.* at 595, quoting from *White v. Minor*, 33 F. Supp. 1194 (D. Mass., 1971)].

The decisions of this Court are in accord with this proposition. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court held that Texas could not terminate a father's parental rights without granting him due process. Similarly, in *Stanley v. Illinois*, 405 U.S. 465 (1972), an Illinois law providing that children of an unwed mother became wards of the state was invalidated. In doing so, the Court noted:

> The Court has frequently emphasized the importance of the family. The right to conceive and raise one's children have been deemed "essential", Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil right of man", Skinner v. Oklahoma,

> 316 U.S. 535, 541 (1942), and "[r]ights far more precious than property rights", May v. Anderson, 345 U.S. 528, 541 (1953). [*Id.* at 651].

The Court then went on to note that the "integrity of the family" has found protection in the due process and equal protection clause of the Fourteenth Amendment, as well as the Ninth Amendment. *Ibid.* Are the above abridgements of parents' rights worse than the execution of one's child without due process of law?

B. While state law may be used to obtain standing, state law of damages may not restrict the uniform federal measure of damages under the Civil Rights Acts.

While Ruby Jones has standing to bring the instant action without resort to state law, state law may also be utilized to fill in any gaps in the state law. The landmark case in this regard is *Brazier v. Cherry, supra,* in which the Court held:

> Thus §1983 declares a simple direct abbreviated test: What is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so. [*Id.* at 409].

In *Brazier,* the Court noted that Georgia had both a wrongful death and a survivorship statute; consequently, the widow of the deceased had standing to sue. The *Brazier* doctrine has been followed consistently, both in

actions based on a state wrongful death statute. See, *e.g., Mattis v. Schnarr, supra; Love v. Davis,* 353 F. Supp. 582 (W.D. La., 1973); *Smith v. Wickline,* 396 F. Supp. 555 (W.D. Okla., 1975); *Galindo v. Brownell,* 255 F. Supp. 930 (S.D. Calif., 1966), and actions based on state survivorship statutes, *Moore v. County of Alameda, supra; Hall v. Wooten, supra.* See also, *Belcher v. Stengel,* 522 F.2d 438 (6th Cir., 1975), *petition for writ of certiorari dismissed,* 97 S.Ct. 514 (1977). As Colorado has both a wrongful death statute, *Colo. Rev. Stat. Ann.* §13-21-202 (1973), and a survivorship statute, *Colo. Rev. Stat. Ann.* §13-20-101 (1973), there can be no question that Ruby Jones had standing to sue for the death of her son.

State law may be used to establish standing, but it is a complete non sequitur to hold, as did the Colorado Supreme Court, that the wholly inadequate state law of damages in death cases must necessarily also apply. As the above-cited cases make clear, state law is to be used only to fill in gaps in the federal law. See, *e.g., Moore v. County of Alameda, supra; Brazier v. Cherry, supra; Shaw v. Garrison, supra.* While it can be argued that the Federal Civil Rights Acts seem to be deficient with respect to standing, there is not similar deficiency with respect to the federal law of damages. Rather, there is a specific statute, 42 U.S.C. §1988, which controls the measure of damages in §1983 actions, and a well-developed body of federal common law. *Basista v. Weir, supra.* Since there is no void in the federal law of damages, the inadequate state law may not be utilized.

The state law of damages is additionally unavailable since state law may only be used where it "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. §1988, *Shaw v. Garrison, supra; Pritchard v. Smith,* 298 F.2d 153 (8th Cir.,

1961). This Court has construed the above language to mean that "[B]oth federal and state rules on damages may be used, whichever better serves the policies of the statutes." *Sullivan v. Little Hunting Park, supra,* at 240. A comparison of the Colorado measure of damages and the federal measure of damages clearly indicates that the Colorado law is inconsistent with the federal law, and does not "serve the purposes" of the federal law.

Under Colorado law, the damages in the instant action are governed by the net pecuniary loss rule.[7] Accordingly, the loss to the parent is limited to the actual net pecuniary loss occasioned by the child's death, even if that loss is limited to the costs of burying the child. *Kogul v. Sonheim,* 150 Colo. 316, 372 P.2d 731 (1962); *Pierce v. Conners,* 20 Colo. 178, 37 P. 721 (1894). Even these pecuniary damages are limited by statute in the case of a non-dependent plaintiff (such as Mrs. Jones) to $45,000. *Colo. Rev. Stat. Ann.* §13-21-203 (1973). Moreover, under Colorado law, no exemplary damages may be awarded in death cases, no matter how brutal the killing. *Hayes v. Williams,* 17 Colo. 465, 30 P. 352 (1892).

The federal measure of damages is, however, much more expansive. It includes, of course, compensation for pecuniary loss, *Spence v. Staras,* 507 F.2d 554 (7th Cir., 1974), but goes far beyond that. Under federal law, in a §1983 action, the plaintiff may recover compensation for emotional and mental distress, *Donavan v. Reinbold,* 433 F.2d 738 (9th Cir., 1970);

[7] For a complete discussion and denunciation of this rule, see Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions,* 49 Denver L.J. 99 (1972).

and loss of companionship and support. *Love v. Davis, supra.*[8]

Under the Civil Rights Acts, the loss of a civil right is itself compensable. Consequently, damages may be obtained without any showing of other loss. *Paton v. LaPrade,* 524 F.2d 862 (3d Cir., 1975); *Hostrop v. Board of Jr. College,* 523 F.2d 569 (7th Cir., 1975); *Rhoads v. Horvat,* 270 F. Supp. 307 (D. Colo., 1967). Moreover, these damages are substantial. As the court held in *Farber v. Rizzo,* 363 F. Supp. 386, 398 (E.D. Pa., 1973), "The value of such rights, while difficult of assessment, must be considered great."

Finally, the Civil Rights Acts were intended not only to provide compensation for the injured victims, but also were intended as a *deterrent* to unconstitutional activity. Congressman Beatty made this clear, stating:

> [If Congress] finds that a citizen's constitutional rights are in jeopardy from any cause, that they have been ruthlessly stricken down or wrongfully denied, and existing laws are inadequate for his relief, it is bound to make such appropriate further legislation as shall be sufficient for his *protection* and redress. [Emphasis added; *Cong. Globe,* 42d Cong., 1st Sess., p. 429].

According to the federal common law, where a deterrent effect is needed, exemplary damages are available. *Fisher v. Volz,* 496 F.2d 333 (3d Cir., 1974);

[8] In federal maritime wrongful death actions, this Court has held as a matter of federal common law that a plaintiff may recover for loss of "support, services, society, and funeral expenses." *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 584 (1973). Plaintiff can see no reason why compensatory damages available in maritime death actions should not also be available in death cases filed under 42 U.S.C. §1983.

Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir., 1970). Thus, it has been uniformly held that exemplary damages are available in §1983 cases. *Basista v. Weir*, supra; Annot. 14 A.L.R. Fed. 608 (1973).

In sum, the federal measure of damages is far more expansive than the Colorado measure of damages. Since the Colorado rule is inconsistent with the federal rule and does not properly serve the purposes of the Act, the insufficient Colorado rule of damages should not be adopted, 42 U.S.C. §1988; *Shaw v. Garrison, supra.* See also, United States Constitution, Article 6, Section 2.

CONCLUSION

For the foregoing reasons, the plaintiff hereby asks this Court to issue its Order reversing the decision of the Colorado Supreme Court and order a new trial on the issue of damages on the §1983 claim.

Respectfully submitted,

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290

Counsel for Petitioner

No. 76-5416

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

RUBY JONES,

Petitioner

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE RESPONDENTS

WESLEY H. DOAN
5945 W. Mississippi Avenue
Lakewood, Colorado 80226

Counsel for Respondents

EDWARD O. GEER
ROBERT E. GOODWIN
Suite 2309, 1700 Broadway
Denver, Colorado 80202

Counsel for Respondent,
Douglas Hildebrant

TABLE OF CONTENTS

TABLES OF AUTHORITIES

Cases:

Page

Constitution and Statutes:

United States Constitution:

Statutes:

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5416

RUBY JONES,

Petitioner

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE RESPONDENTS

OPINION BELOW

The opinion of the Supreme Court of Colorado (No. 26828) is reported at 550 P. 2d 339.

JURISDICTION

The opinion of the Colorado Supreme Court was entered on May 24, 1976 (A. 43). A timely petition for rehearing was filed, and was denied by the Colorado

Supreme Court on June 21, 1976 (A. 52). A timely petition for Writ of Certiorari was granted on January 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

May a State's wrongful death action be transformed into a "constitutional tort", irrespective of *Erie* and Amendment X of the United States Constitution?

Is there a federal common law from which a measure of damages may be formulated for a constitutional tort, irrespective of *Erie* and Amendment X of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, ARTICLE III, provides in part:

"SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

"SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * * *"

U.S. Constitution, Amendment X, provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const., Amend. XIV, provides in part:

* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *

42 U.S.C. §1983, provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979).

42 U.S.C. §1988, provides:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and of Title 18 for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. §722).

Colorado Revised Statutes Annotated (1973) provides:

"*13-21-201. Damages for death.* (1) When any person dies from any injury resulting from or occa-

sioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show

that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

* * *

"*13-21-202. Action notwithstanding death.* When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

* * *

"*13-21-203. Limitation on damages.* (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."

STATEMENT OF THE CASE

On October 15, 1973, the Petitioner, Ruby Jones, filed a complaint in the District Court in and for the City and County of Denver. Petitioner named police officers Douglas Hildebrant, Brian Moran, and the City and County of Denver as Defendants. (R. 5). In her original complaint, Petitioner stated four claims for relief: (1) battery, (2) negligence; (3) for deprivation of civil rights 42 U.S.C. §1983; and (4) for deprivation of civil rights based upon conspiracy, 42 U.S.C. §1985, §1986. In an amended complaint subsequently filed, the fourth claim for relief was dismissed and Officer Moran was dropped from the action. (A. 2).

The facts which gave rise to this cause of action occurred on February 5, 1972. On the evening of February 5, Officers Hildebrant and Moran, responding to a silent burglar alarm, came upon Petitioner's son (Larry Jones).

Immediately after discovery, a chase ensued and during said chase, Officer Hildebrant shot and killed Larry Jones.[1] (R.).

In their answer, Respondents admitted: (1) that Officer Hildebrant did shoot Petitioner's son; and (2) Officer Hildebrant acted under color of state law and within the course and scope of his employment. (A. 5).

Respondents asserted as affirmative defenses that: (1) Officer Hildebrant acted in self defense, and (2) used no more force than was reasonably necessary in an effort to apprehend the Decedent, a fleeing felon, in the belief that his own life and the lives of others were in danger at the time of the shooting. Respondents also asserted that Officer Hildebrant had probable cause and a reasonable apprehension of present threat to life, both his own and others. (A. 5).

On November 11, 1974, the trial began. (R. 37). On November 14, 1974, Petitioner's 42 U.S.C. §1983 claim was struck. (A. 31). The Trial Judge Charles Goldberg, held that Petitioner's §1983 claim was coextensive, congruent

---

[1] Neither the Court nor the parties have access to a complete transcript of the trial because none was prepared for consideration by the Supreme Court of Colorado. Accordingly, an accurate and complete recital of the facts which gave rise to this cause of action, are unfortunately, unavailable, from the Record before this Court.

[2] Quoting from the trial Court's opinion (A. 30) "... The Court would note that Mrs. Jones, in her Third Claim for Relief, claims deprivation of her civil rights in three material respects. Number one, her child's right to life. Two, the right to her child's freedom from physical abuse, coercion, intimidation and physical death. Three, her right to her child's equal protection of the law is absurd at this juncture when considered in light of the evidence produced at trial. Her other

and redundant with her claim under the Colorado wrongful death statute.[2] (A. 30).

In addition, the trial Court ruled that the wrongful death statute did not permit the recovery of punitive damages (A. 20), and it had also limited Petitioner's recovery to a maximum of $45,000 because she was not a dependent of the deceased. (A. 15).

The case thus went to the jury on Petitioner's state law claims only. On the issue of damages, the jury was given two instructions numbered 19 and 20 (R. 73, Folio 119 and R. 74, Folio 120, respectively),[3] and returned a verdict finding the issues of liability under state law in Petitioner's favor and assessed damages of $1,500 against Respondents. (A. 38).

Petitioner subsequently filed her motion for new trial (A. 40) on the issue of damages which the trial judge denied (R. 98). Plaintiff next filed a notice of appeal (A. 42) to the Supreme Court of Colorado, which affirmed the judgment of the trial court. (A. 43).

On Petitioner's appeal, she asserted that the judgment

---

claims, however, can only be coextensive with her son's rights in these areas; that is to say, she can have no greater rights to her son's life than he, himself, had to his own life. And to the extent that Larry Jones had inalienable rights to life and freedom from physical abuse, these rights are covered by substantive tort law which includes the defenses available under that law, particularly the defenses of self-defense and the fleeing felon laws. Therefore, the Court feels that in this case the Plaintiff's First and Third Claims for Relief are coextensive, congruent [and] redundant in this case when considered in the light of the evidence. The Court can envision, however, where a case could arise where the state and federal claims are not redundant, but the Court does not feel that under the evidence established in this case that that has been established."

should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the net pecuniary loss rule.

With respect to Petitioner's appeal on the limitations placed on damages recoverable under the state law claims,

---

[3] Because of the number of issues fairly comprised within the issue presented to the court by Petitioner, we deem it necessary to set out the instructions of damages in detail.

Instruction #19—"If you find in favor of the Plaintiff, Ruby Jones, on her claim of negligence you shall assess as her damages, insofar as they have been established by the evidence, an amount which will fairly and justly compensate her for the net pecuniary or financial loss, if any, she sustained by reason of the death of Larry Jones, but not exceeding the sum of $45,000. In assessing damages, you may consider any mitigating or aggravating circumstances attending any such wrongful act, neglect or default.

The net pecuniary or financial loss is equivalent to the pecuniary or financial benefit, if any, which the Plaintiff may reasonably have expected to receive from Larry Jones had he lived.

Whether pecuniary injury has been proven by the evidence is for you to determine. Your verdict must be based upon evidence and not upon speculation, guess, or conjecture. No recovery is allowable for solace, grief or sorrow."

Instruction #20—"The net pecuniary loss, if any, sustained by the Plaintiff, Ruby Jones, as the parent of Larry Jones would be the reasonable value of any services Larry Jones might have rendered and earnings he might have made while a minor together with any support he might reasonably have been expected to provide the Plaintiff, Ruby Jones, after he became on adult, less the expenses the Plaintiff might reasonably have incurred in maintaining Larry Jones and providing him with an education.

In determining the net pecuniary loss, if any, you should consider Larry Jones' as well as the Plaintiff's ages, health, conditions of life, probable duration of lives and their abilities to earn money. You should also consider Larry Jones' habits of industry and his disposition to aid and assist the Plaintiff, Ruby Jones, taking into account not only the legal relationship between Larry Jones and the Plaintiff, Ruby Jones, but also the actual relations between them as manifested by acts of service or pecuniary assistance, if any, rendered by Larry Jones to the Plaintiff, Ruby Jones.

the Colorado Supreme Court declined to discard the "net pecuniary loss" rule.[4] Further, the Colorado Supreme Court upheld the verdict as being not inadequate as a matter of law under the evidence presented.[5] (A. 46).

Neither of these issues is presented for review by this Court, nor could they be as pointed out in the Lawyer's Committee Amici Curiae Brief.

Plaintiff's petition for rehearing was denied. (A. 52). Subsequently, this Court granted certiorari. (A. 58).

---

[4] "The suggestion that this court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction . . ." (A. 45).

[5] "Based on our review of this record, we cannot conclude that the verdict is 'grossly and manifestly inadequate' as to 'clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other considerations'. The evidence of plaintiff's damages was vague and insubstantial." (A. 45).

SUMMARY OF THE ARGUMENT

I. The Creation Of A §1983 Wrongful Death Action Is Inconsistent With Amendment X And The Erie Doctrine

A. The creation of a federal common law in a §1983 civil rights action is contrary to the *Erie* doctrine.

1. This would thrust the federal and state judicial systems into a state of confusion.

2. Federal courts would have no statutory guidelines by which to ascertain the measure of damages.

3. The effect of a §1983 federal common law must necessarily result in the rejection of *Erie v. Tompkins.*

4. This would return the federal courts to the judicial adventurism of the *Swift* v. *Toyson* era.

B. Amendment X precludes any federal common law in §1983 wrongful death actions.

1. Tort law is, and has traditionally been, an area governed by state law.

2. No Constitutional or statutory authorization exists to enable a federal common law to govern §1983 wrongful death actions.

II. Petitioner Was Provided Access To The Courts Through The Colorado Wrongful Death Act. This Is Consistent With The Intent And Purpose Of The Civil Rights Act

A. It was Petitioner's choice to bring this action in the Colorado courts. Therefore, she is bound by the provisions of the Colorado Wrongful Death Act.

B. Petitioner has not been denied due process of law nor the protections envisioned by the Civil Rights Act.

1. If Petitioner had a §1983 claim she could have pursued it in the Federal District Court.

2. One of the reasons for the enactment of §1983 was to ensure that plaintiffs in civil rights cases have a federal forum in which to vindicate their claims where access to the state courts is being denied.

3. Adjudication of Petitioner's claim in state court was consistent with the intent and purpose of the Civil Rights Act.

III. The Creation Of A Federal Wrongful Death Remedy Would, In Fact, Create A Constitutional Tort Law

A. Petitioner's action is not transmuted into an exclusively federal claim simply because the defendant is the state, acting through its agent police officer.

1. Following Petitioner's line of reasoning, any tort committed by one acting "under color of law" would be a violation of the Fourteenth Amendment.

2. Further, Petitioner apparently would have all such suits governed by a non-existent federal rule of damages.

B. It was *not* the intent of Congress to include wrongful death actions in the Ku Klux Act of 1871, now codified as §1983.

1. *Congress specifically considered and rejected the inclusion of any type of wrongful death provision in §1983.*

C. The Procedural guarantees of the Fourteenth Amendment Due Process Clause cannot be the source of a Constitutional tort law.

1. The Fourteenth Amendment is limited by the fact that it does not alter the fundamental balance between the states and the national government as embodied in Amendment X.

2. The very foundation of federalism would be threatened by creation of a Constitutional tort law.

D. The creation of a Constitutional tort law would abrogate state tort law in civil rights actions.

1. The §1983 remedy was intended by Congress to be supplemental. It is properly used where a state remedy does not exist, or where a claimant is being denied access to the state courts to pursue [her] claim.

2. Tort law is state law and should not be proscribed by a Constitutional tort law.

E. Congress, not the courts, is the proper branch to determine whether any body of general federal tort law is necessary.

1. The unique problems of such a proposal are more properly a matter of legislative adjudication.

IV. §1983 Does Not Expressly Provide For Wrongful Death Actions, Nor Can They Be Implied

A. Wrongful death actions were not recognized at common law, accordingly, being a creature of statute, they must be strictly interpreted.

B. Wrongful death actions cannot be implied from §1983.

1. Congress considered, debated and rejected the inclusion of wrongful death in §1983.

2. All the Circuit Courts that have analyzed the problem of the inclusion of *wrongful death* in §1983 have rejected it.

3. The remedy for wrongful death provided by the Colorado Wrongful Death Act is not inconsistent with the intent and purpose of the Civil Rights Act.

ARGUMENT

I. The Erie Doctrine And Amendment X Of The Constitution Militate Against The Creation Of A §1983 Federal Wrongful Death Action By The Creation Of A Constitutional Tort

Petitioner asks this Court to establish a Federal Common Law and return us to the days of *Swift* v. *Tyson*, 41 (16 Pet.) U.S. 1; 10L., ed 865 (1842), when our courts were under the erroneous assumption that there was a Federal Common Law in matters such as the one before the Court.

The original colonies in setting up their nation in infinite wisdom created a Constitution and granted to the Federal Courts certain powers as set out in Article III of the Constitution and left all others to the states, Amendment X of the Constitution.

Therefore, the United States is a country that exists by virtue of its Constitution, laws of Congress and treaties made pursuant thereto. These being the governing tools, there can be no Federal Common Law affecting cases such as the one before this Court.

If there is any Federal Common Law, it must be found in Article III of the Constitution and only in the following instances:

a. Cases in which a state is a party.

b. Cases in admiralty and maritime law.

c. Cases involving proprietary duties of the United States.

d. Cases in international law.

Only in the above matters do the Federal Courts have authority to act without consulting state law.

From 1842 to 1938 our judicial system was operating on the misconception that there was a Federal Common Law, *Swift* v. *Tyson*, supra, that brought us nothing but confusion. Mr. Justice Brandeis, in *Erie Railroad* v. *Tompkins*, 304 U.S. 64, in a scholarly opinion stated that there cannot be any Federal Common Law, and after great concern and consideration, this Court in its wisdom overruled *Swift* v. *Tyson*, supra:

> "If only the question of statutes construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."

Notwithstanding the constitutional ground taken in *Erie Railroad* v. *Tompkins*, supra, which was precisely the right ground—indeed the only tenable one—many of our inferior courts have erroneously applied in their decisions what they feel should be a Federal Common Law when their views conflict with the state's law.

This Court in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, (1969) added to the confusion and doubt that exists when it stated at page 229:

> "This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

This statement does not permit us to use any kind of definitive rule of law, but leaves it up to the inferior court's views to tell us what the law should be.

There is no Federal Common Law that can be applied to these types of cases as long as *Erie Railroad* v. *Tompkins, supra,* is on the books.

The choice of law in Civil Rights cases is now complicated, with gaps all through the Act as it is presently written. It is not this Court's duty or prerogative to fill these gaps. It is the duty of Congress either to amend or write a new Civil Rights law. If this is not accomplished, we will have nothing but a hodgepodge of law as each inferior court will be using its own theory of law. Until Congress amends §1983 or §1988 as to wrongful death cases, only the state law can and should be used as stated in *Erie Railroad* v. *Tompkins,* supra, page 78:

> "Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Congress created the Federal Courts, under the United States Constitution, and it is up to Congress to set out in a statute what the Federal Courts can and cannot do.

Since the Congress did not see fit to provide a wrongful death statute in the Civil Rights Act, §1983 or §1988, the Federal Courts on their own initiative should not create any wrongful death law, as this would be creating a Federal Common Law where none exists.

This Court has placed limitations on the creation of federal common law.

> "As respects the creation by the federal courts of common law rights, it is perhaps needless to state that we are not in the free-wheeling days ante-dating *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64. The instances where we have created federal common law are few and restricted. *Wheelden* v. *Wheeler,* 373 U.S. 647 (1963) p. 651.

Petitioner elected to have her day in a state court, and she is bound by state law, whether that law be promulgated by the judiciary or by statute. The Federal Court is only a few blocks distant from the state court in this city, and if Petitioner thought she had greater rights in a federal court, she should have availed herself of that jurisdiction. But, what she was trying to do was take that part of the state law that suited her fancy and any federal law that she might request the state court on its own initiative to consider, to make available to her greater rights than she was allowed under strictly state law.

However, even by using federal jurisdiction, she could not gain any greater relief or rights than she was afforded in the state court, as the Federal Court is required to follow state law if there is no applicable federal law, and it is our position that there is no applicable federal law in wrongful death cases. See *Guaranty Trust Company of New York* v. *Grace W. York,* 326 U. S. 99, where it is further stated at pages 101 and 102:

> "******Erie Railroad* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.

> Accordingly, federal courts deemed themselves free to ascertain what Reason and therefore Law, required wholly independent of authoritatively declared state law, even in cases where a legal right as the basis for relief was created by state authority and could not be created by federal authority****" Citations omitted.

Mr. Justice Brandeis stated the law in *Erie Railroad* v. *Tompkins* so simply that we must wonder why our inferior courts cannot follow that complementary concept that federal courts must follow state decisions in matters of law appropriately cognizable by states; and we must wonder why anyone should want to shy away from Mr. Justice Brandeis' pronouncement and to complicate matters.

Establishing a federal common law measure of damages would revert the law to a "brooding omnipresence" of reason, whereby federal courts would be free to ascertain measures of damages without statutory guidelines.

Therefore, what Federal Common Law this country had for over a century was put to rest in *Erie Railroad* v. *Tompkins*, supra, when *Swift* v. *Tyson*, supra, was overruled.

II. Justice Is Not Lacking In This Case. Petitioner Was Afforded a Remedy Under The Colorado Wrongful Death Act And Therefore Was Not Denied Access To the Courts. Petitioner Has No Personal Constitutional Right Actionable Under 42 U.S.C. §1983.

It is not at all clear what Petitioner asks of this Court.

Apparently, Petitioner claims that she has a constitutional right to the life of her child, the right of parenthood, and that that right is actionable pursuant to 42 U.S.C. §1983.

Petitioner impliedly admits that her claim is uniquely brought under 42 U.S.C. §1983 in that she cites as authority a number of decisions which have attempted to resolve the problem of survival of actions brought under 42 U.S.C. §1983.

If Petitioner is pursuing her own separate constitutional right to the life of her child, there is no problem of survival of her 42 U.S.C. §1983 claim in that there is no indication that Petitioner is deceased.

The Supreme Court of Colorado was of the opinion:

> "***** the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d. 510 (1965), and *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a 'family' of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute." 550 P.2d at 345.

Petitioner, Ruby Jones, contends that since she is the mother of the Deceased, that she has a claim under §1983

for the violation of *her* own constitutional rights. Those rights are asserted to be the rights of "parenthood," which may not be deprived without due process of law. This argument derives by tortuous analogy from *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974), *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

This argument has no merit. *Mattis* merely held that a parent has sufficient interest in the life of his child to give the parent standing to challenge the constitutionality of Missouri's justifiable homicide statute upon which a policeman relied in killing the parent's child during the course of an arrest; no finding of a "constitutional" right in the child's life was necessary for the purpose of standing to assert the constitutional challenge.

Stanley and *Armstrong* recognized parental rights as protected under the Fourteenth Amendment, and held that those rights could not be infringed upon *by adjudication without notice* to the parent of the judicial proceeding and an opportunity to be heard.

Due process is afforded to Ruby Jones by the availability of Colorado's wrongful death action. *Jones* v. *Hildebrant*, 550 P.2d 339 (Colo. 1976).

> "The mere allegation that a tort has been committed is insufficient in itself to bring plaintiff's claim within the protection of the Civil Rights Act." *Evain* v. *Conlisk*, 364 F. Supp. 1188 N.D. Ill. 1973).

Accord, *Paul* v. *Davis*, 424 U.S. 693, (1976).

In *Evain*, a daughter contended that her constitutional rights—to care, love, association, and financial support—

were violated when her father was killed by Chicago police officers. The court denied that the daughter established a deprivation of violation of a constitutional right. 364 F.2d Supp. at 119. *Accord*, *James* v. *Murphy*, 392 F. Supp. 641, 646 (M.D. Ala. 1975).

III. Problems In The Creation Of The Constitutional Tort Of Federal Wrongful Death.

Petitioner appears alternatively to suggest that as a survivor of her son, Larry Jones, *she* has a right to pursue, under 42 U.S.C. §1983 via 42 U.S.C. §1988, and the Colorado Wrongful Death Act, Colorado Revised Statutes §13-21-201 et seq., her *child's right* to life, *his* right to freedom from physical abuse and intimidation and *his* right to equal protection of the laws,[6] all of which Petitioner claims were violated by the State, i.e., The City and County of Denver and its agent police officer.

Petitioner has asserted not a claim for deprivation of rights secured by the Fourteenth Amendment, but a claim for wrongful death under the laws of Colorado.

Petitioner, therefore, contends since Respondents are the State acting through the City and County of Denver and its agent police officer, that her wrongful death action is thereby transmuted into a claim for deprivation by the State of rights secured to her son by the Fourteenth Amendment.

---

[6] It should also be pointed out that an attempt to sue under the civil rights statutes for the deprivation of another's constitutional rights is impermissible. *O'Malley* v. *Brierley*, 477 F. 2d 785 (3rd Cir. 1973).

This Court has recognized the illogic of such a contention and has noted that serious questions as to the proper relationship between the federal and state governments arise in any attempt to derive from the federal civil rights acts a body of general federal tort law. Cf. *Paul* v. *Davis*, 424 U.S. 693 (1976); *Greenwood* v. *Peacock*, 384 U.S. 808 (1966); *Griffin* v. *Breckinridge*, 403 U.S. 88 (1971); U.S. Constitution, Amendment X.

Quoting this Court in *Paul* v. *Davis*, 424 U.S. 693 (1976):

> "We, too, pause to consider the result should respondent's interpretation of §1983 and of the Fourteenth Amendment be accepted.
>
> If Respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under §1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by Respondent."

The Supreme Court of Colorado denied Petitioner's request to transmute Colorado tort law into a new federal form which could fairly be termed constitutional tort law. *Jones* v. *Hildebrant*, 550 P.2d 339 (1976).

The effect of the decision of the Supreme Court of Colorado is that its state tort law ought to be left intact, and that the purpose of §1983 to provide a federal forum where a claimant has been denied access to the state courts ought not to be expanded further. Cf. *Paul* v. *Davis*, supra. Stated differently, the Supreme Court of Colorado held that Petitioner had a right to her son's life and that she had a state forum remedy readily accessible for vindication of her rights. Had Petitioner's right to sue in the state court been hampered by state action, she certainly would have had a valid §1983 claim.

In *Screws* v. *U.S.*, 325 U.S. 91, 108-109 (1945), this Court said, "to make all torts of state officials federal crimes" was not the intention of Congress in guaranteeing the application of the Fourteenth Amendment to the states. Such, however, would be the effect if this Court grants Petitioner's claim that she will be deprived of her Fourteenth Amendment rights of due process if there is not a uniform federal remedy and rule of damages created. The application of this new remedy and rule of damages would fall almost exclusively upon public officials and render any tort they commit in their official capacities actionable under a federal remedy and rule of damages, rather than the

state tort law and its attendant rule of damages. This could lead to the situation this Court warned of in *Paul* v. *Davis*, supra. In that case the Court explained that the Fourteenth Amendment was not to be viewed in such an overreaching manner. Rather, the Amendment was limited by the fact that it "did not alter the basic relation between the states and the national government." *Screws* v. *U.S.*, supra, at 108-109. It is this very relation that is threatened by Petitioner's claim upon the Fourteenth Amendment.

If this Court creates a constitutional tort law superseding that of the states in certain areas by means of §1983 and the Fourteenth Amendment, it is applying that Amendment in precisely the manner found objectionable in *Paul* v. *Davis*, supra. Petitioner apparently believes that,

> "The Fourteenth Amendment's Due Process clause should *ex proprio vigore* extend to [her] a right to be free of injury wherever the state may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'Constitutional shoals' that confront any attempt to derive from Congressional civil rights statutes a body of general federal tort law, *Griffin* v. *Breckinridge*, 403 U.S. 88, 101-102, 29 L.Ed. 2d 338, 91 S. Ct. 1790 (1971); a fortiori the procedural guarantee of the Due Process clause cannot be the source for such law." *Paul* v. *Davis*, *47 L.Ed. 405, 413-414.*

Petitioner asserts there should be a uniform federal rule of damages in §1983 wrongful death actions and asks this Court to create that rule. This, in effect, creates a "Constitutional tort law" for use in §1983 actions and thus would be a unique and extremely far-reaching decision for

this Court to make. In discussing whether or not to judicially fashion a federal uniform statute of limitations, this Court in *International Union, United Auto, et al.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702-703 (1966) stated,

> "Thus, although a uniform limitations provision for Section 301 [of the Labor Management Relations Act] suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.
>
> That Congress did not provide a uniform limitations provision for Section 301 suits is not an argument for judicially creating one . . ."

The same is true of §1983-§1988. Congress has not deemed it necessary to create a uniform rule of damages in §1983 actions and thus this court should not create one.

The creation of a Constitutional tort law is perhaps most inappropriate in light of the almost exclusively state orientation of tort law. This is an area where federal law, statutory or common, has been only minimally applicable.[7] Where Congress has deemed it necessary to apply federal law to the area of torts, it has enacted special legislation, such as the Federal Employers' Liability Act, 45 U.S.C. 51; The Jones Act, 46 U.S.C. 688, etc. In the case of §1983, Congress has not implemented any legislation providing for damages, besides §1988. This is a strong indication that Congress does not sanction the abrogation of state tort law in favor of a uniform federal rule of some sort.

Further, Petitioner's argument to establish a uniform

---

[7] See, 32 AmJur 2d Section 65.

federal common law to measure damages under a §1983 action must fail because there is no congressional basis or intent authorizing the federal courts to create such a uniform measure of damages. Petitioner misconstrues the congressional intent and purpose of the Ku Klux Klan Act of 1871, 17 Stat 13 §1 now codified as 42. U.S.C. §1983 when she alleges that the congressional intent indicates that §1983 was intended to control state activity by providing an exclusive federal remedy for the violation of federal civil rights.

This Court, in *Monroe* v. *Pape* (365, U.S. 167, 1961) conducted a painstaking and thorough analysis of the history of the Civil Rights Acts in order to explain the background of the Act and the intent of Congress in construing the Acts.

In this opinion, Justice Douglas stated:

> When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city or parish" in which certain acts of violence occurred liable "to pay full compensation" to the person damaged *or his widow or legal representative.* (Id at 188) (Emphasis added).

This Court went on to examine whether or not it was the intent of Congress to "[I]mpose civil liability on municipalities . . ." (Id. at p. 190). This Court noted that there was considerable opportunity for debate on this subject and that liability on municipalities was not included in the final version of §1983. Thus, this Court reasoned, it would be improper to construe the word "person" to include municipalities in the context of §1983 since the Congress specifically considered and rejected such a proposal. This line of

reasoning was also followed in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), where the same problem in a slightly different context was considered.

We note that the passage quoted from Justice Douglas' opinion (supra) includes the words ". . . or his widow or legal representative." We further note that this passage was specifically *excluded* from the final version of §1983. It is our strong contention, using the same line of reasoning this Court used in considering municipal liability, that it was beyond the express intent of Congress to include Survival/Wrongful Death actions from §1983. We further urge that it is inconceivable that Congress could have merely "overlooked" this lack of survival aspect of §1983 since there was ample opportunity to consider and debate the matter; an express survival provision *was* included in §1985/1986. Furthermore, a comparison of §1983 and the original amendment (Cong. Globe, 42d Cong. 1st Sess., p. 663) (1871)[8] can lead us to no other conclusion. Therefore, it is our strongest contention that Congress intended to specifically *exclude* such actions from the scope of §1983.

* * *

---

[8] The specific Amendment Justice Douglas was interpreting for the Court in *Monroe* v. *Pape*, supra, reads as follows:

> "§7. That if any house, tenement, cabin, shop, building, barn or grocery shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; [or if any persons shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons] riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him from (for) exercising any such right, or by reason of his race, color, or previous condition of servitude, *in every such case the inhabitant of the county, city, or parish in which any of the said offenses*

In *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court traced the legislative history of §1983 and determined its purpose. First, it is to override certain state laws ". . . amounting to invidious legislation by states against the rights or privileges of citizens of the United States." Cong. Globe, 42d Cong., 1st Sess., p. 244. Second, to provide a remedy where state law is inadequate. Clearly, congressional intent was not to provide an exclusive federal remedy, but rather, to provide citizens a forum to redress their grievances when state law failed to provide a remedy.

Finally, any decision to adopt some sort of uniform federal rules as to damages in §1983 wrongful death actions must come from the Congress and not the courts. The legislature is the proper forum in which to decide this question. In urging this Court to refrain from determination of Labor Board cases, Justice Black dissenting in *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962), 203-204 said,

> ". . . by permitting suits like this one to be filed it is now not only possible, but highly probable that unfair labor practice disputes will hang on like festering sores

---

shall be committed, shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his legal representative, if dead; and such compensation may be recovered by such person *or his representative* by a suit in *any court of the United States* of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or *his legal representative,* and against said county, city or parish; (1) (A) and execution may be issued on a judgment rendered in such suit, (-), and may be levied upon any property, real or personal (,) of any person in said county, city or parish and the said county, city, or parish may recover the full amount of such judgment, costs or interest from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction." Cong. Globe, 42d Cong. 1st Sess., p. 663 (Emphasis added).

> that grow worse and worse with the years . . . But if such drastic changes are to be wrought . . . it seems important to me that this Court should wait for Congress to perform that operation."

IV. It Is Clear That There Is No Survival Of §1983 Wrongful Death Actions Via §1988

At the outset, we note that every court, confronted with the problems of survival of §1983 actions, has admitted that no *express* survival provision obtains in the Federal Civil Rights Statutes pertaining to §1983, nor in §1983 itself.

Four Circuit Courts of Appeal have addressed the problem of lack of express survival provisions for §1983 actions. All of the four circuits have turned to §1988 to authorize the incorporation of state survival and/or wrongful death statutes to fill the gap in Federal law. In addition, all of the Four Circuits, until recently, have incorporated whole state statutory provisions in this regard.

In no case has a Federal Court incorporated a state survival or wrongful death remedy[9] and yet rejected its accompanying damage remedy. This may be because of the language of Section §1988—that a state law, when incorporated into §1988, "Shall be extended to and govern the said courts in the trial *and disposition* of the cause . . ." 42 U.S.C. §1988 (Emphasis added).

Petitioner cites only one case (and our research agrees) in which a Federal Court has rejected a state sur-

---

[9] In addition, there appears to be no reported cases in which punitive damages have been awarded in a §1983 case involving survival or wrongful death.

vival statute as inconsistent with the Federal Civil rights laws. That case is *Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977). In *Shaw*, the plaintiff instituted a §1983 suit alleging violation of constitutional rights through malicious prosecution. The plaintiff died before the suit came to trial. Under Louisiana law, the plaintiff's claim abated, and survived in favor of no one. The Fifth Circuit held that state law was inconsistent with Federal law under the §1988 because plaintiff (and his successors) were left without a *remedy* for the constitutional violation, in either federal or state courts. *Shaw*, 545 F. 2d at 983. Then, and only then, did the court consider it proper to look to a "federal common law" of survival to enforce the purpose of §1983 to provide a remedy for constitutional violations. Id. at 984 Cf. *Moragne* v. *State Marine Lines*, 398 U. S. 375 (1970).

Unlike the instant case, *Shaw* was concerned with the survival of an action *already* instituted, not a wrongful death action. This distinction was clearly brought out when the Fifth Circuit quoted with approval from the lower District Court's opinion the following:

> "We emphasize at the outset that we are not concerned with wrongful death actions for damages to others caused by the tort victim's death. Also to be distinguished are survival of causes of action, where the tort victim dies without bringing suit, and the question is whether a party may *institute* suit to recover for the tort victim's own damages." 391 F. Supp. at 1361. (Emphasis in original)

Moreover, the problem in *Shaw* was that the particular statute barred recovery in either state or federal courts. In the present case, Petitioner was not barred from pursuing

her wrongful death action in either state or federal court and indeed instituted her action in state court.

The unique solution developed by the Fifth Circuit may very well create more problems than it resolves. If a court, in a §1983 action, may utilize a state remedy via §1988, and excise those portions which it finds "inconsistent" with the spirit and purpose of the Federal Civil Rights Acts, it can plausibly be argued that the result would be inconsistent with the mandate of the Constitution of the United States. We are specifically addressing the privileges and Immunities/Equal Protection clauses of the Constitution. This solution (by the Fifth Circuit) could very well create the anomolous situation whereby a state court, entertaining a wrongful death action could reach two entirely different results, where one of the actions is brought under §1983. The effect would be to create two classes of citizenry within one jurisdiction by judicial decree. It would deny some citizens the privileges and immunities that would accrue to others. It is interesting to note that, had Petitioner's cause of action arisen through the act of one *not* operating "under color of state authority," she would find herself an unfortunate member of the class of citizenry she proposes to create. It is obvious, furthermore, that such a proposal would also create two classes of defendants.

Within the context of this Court's interpretation of §1988 in *Moor*, *Shaw* presents fewer problems in that survival statutes do not create causes of action,[10] they merely allow a cause of action to survive death to protect the interests of the decedent.

The Court in *Moor* v. *County of Alameda*, supra, at 703-705 stated:

> "Properly viewed . . . §1988 instructs the federal court as to what law to apply in causes of action arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action . . . *Considered in context . . . §1988 . . . was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act . . .*" (Emphasis added.)

It appears that the Court was adding a cautionary note in *Moor* with reference to the Court's previous holding in *Sullivan*, that both federal and state measures of damages may be utilized under §1988, i.e., the Court cautioned that both federal and state sources may be used only where necessary to protect the interests found in other provisions of the Act.

Moreover, it appears that this Court may have already overruled the dual remedy approach of *Sullivan*, supra, and implicitly rejected Petitioner's and the Circuit Courts' various §1988 incorporation of state torts *solution* to the lack of an express survival of §1983 death claims. See: *Runyon* v. *McCrary*, 427 U. S. 160, 96 S. Ct. 2586 (1976), where

---

[10] Theis, *Shaw* v. *Garrison: Some Observations on 42 U.S.C. §1988 and Federal Common Law*, 36 La Law Review 681 (1976): "If section 1988 can be employed only 'in actions brought to enforce the substantive provisions of the Act, '49 protection under state or federal law of the survivors' interests seems inappropriate. *Brazier*, it is argued, incorrectly extended [50] recovery to protect the survivors' interests. Nothing in the text of section 1983 sanctions the protection of their interests. Although the survivors of a person whose life was taken as the result of deprivation of constitutional rights may be 'injured,' 'the party injured' in the text of section 1983 refers only to the victim of a deprivation of constitutional

plaintiffs sought to apply §1988 to incorporate in §1981 a state provision for the recovery of attorney fees. This Court firmly rejected the plainitiff's claim—advanced in effect by petitioner in the case at bar—that §1988,

> "embodies a uniquely broad commission to federal courts to search among the federal and state statutes and common law for the remedial devices and procedures which *best* enforce the substantive provisions of Section 1981 and other civil rights statutes." Id. at 2601 (emphasis added).

We question the impact on federal-state relations if this Court elects to incorporate *all or only* parts of the various state survival provisions and thereby creates a new §1983-§1988 Wrongful Death action,[6] a new "constitutional tort."

This Court would need to set forth the proper parties, elements and measure of damages for the Court created §1983-§1988 Wrongful Death action, and provide answers to several questions:

(1) Does §1988 authorize the incorporation of Colorado's Wrongful Death statute into federal law to allow a §1983 claim to survive death?

---

rights. It would be a strained reading of section 1983 to say that the 'person' deprived of his rights and the 'party injured' were not always identical. A deprivation leading to death would not deprive the members of the family of constitutional rights belonging to themselves.[51] Although *Brazier* had a justifiable concern lest death—either fortuitous or intentionally inflicted—absolve a wrongdoer,[52] the interest to be protected is the vindication of the decedent's constitutional rights. State law insofar as it protects the survivors' interests may properly be considered only with respect to whatever pendent state law claims they may wish to present.

(2) If §1988 does so, should the entire statute including its measure of damages be incorporated or may the Court pick the damages allowed by some other state or may the Court determine the measure of damages or is there a federal common law of damages to which the Court could turn?

(3) If §1988 does not authorize the incorporation of the entire Colorado statute into federal law, should the Court determine that the measure of damages in a §1983-§1988 Colorado Wrongful Death case be greater than the $5,000 measure expressly provided by Congress in §1985-§1986 death actions?

(4) If the Court determines the proper measure of damages in a §1983-§1988 Colorado Wrongful Death case to be different from those expressed in the Colorado statute:

(a) Has the Court gone beyond *Erie* and created a new §1983 remedy by changing the measure of damages used in the Colorado statute?

(b) Has not the Court created two wrongful death remedies denying Colorado citizens equal privileges and immunities under its law?

(c) How should a trial court instruct and explain the difference between a Colorado Wrongful Death action and a §1983-§1988 Colorado Wrongful Death action?

Petitioner's unprecedented theory of §1983 liability and request to transform Colorado tort law into a new "constitutional tort" by the tortuous §1983-§1988 route

must surely fail. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 96 S. Ct. 598 (1976).

This Court has stated:

> "Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, *United States* v. *Price*, 383 U.S., at 801, *so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it.*" (Emphasis added) District of Columbia v. Carter, 409 U.S. 718 (1973)

CONCLUSION

For the reasons hereinabove argued, it is respectfully submitted that the trial court and the Supreme Court of the State of Colorado were entirely correct in finding, holding and ruling that the Petitioner's remedy was under the Colorado Wrongful Death Act and in rejecting the Petitioner's claim under §1983. Moreover, it is the position of these Respondents that no error was committed by the trial court or by the Supreme Court of the State of Colorado in affirming the action of the trial court in the application of the applicable law: that its findings and rulings are entirely consistent with the record as made; and accordingly, such judgment should in all respects be affirmed.

Respectfully submitted,

WESLEY H. DOAN
5945 West Mississippi Avenue
Lakewood, Colorado 80226

Attorney for Respondents

EDWARD O. GEER
ROBERT E. GOODWIN
Suite 2309, 1700 Broadway
Denver, Colorado 80202

Counsel for Respondent,
Douglas Hildebrant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONER

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290
Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONER

THE INSTANT CASE IS NOT GOVERNED BY ERIE R.R. CO. v. TOMPKINS.

The Respondents first argue that the instant case is governed by *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938) [Brief of the Respondent at 10]. Consequently, they argue, Petitioner's § 1983 action is controlled by state law. This argument is grossly misleading. *Erie* was a diversity suit and stands for the proposition that in a diversity suit, the

law of the state must be applied. In so holding the Court stated:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State." [*Id.* at 78].

42 U.S.C. § 1983 is, of course, an Act of Congress passed to protect federal constitutional rights. Consequently, the *Erie* doctrine has absolutely no applicability to the instant case.

In *Pritchard* v. *Smith,* 289 F.2d 153 (8th Cir., 1961), a case cited with approval by this Court in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), the court specifically rejected the Respondents' contention. In *Pritchard*, the court was faced with the question of whether a § 1983 action survived the death of the victim. In holding that it did, the court stated:

> We fully agree with the trial court's conclusion that this is an action arising under federal statute and that consequently federal law governs. In such a situation, the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, does not apply.

Accord, *Martin* v. *Duffie,* 463 F.2d 464, 468 (10th Cir., 1972). See also, *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

While state law may not *control* an action brought pursuant to the federal Civil Rights Acts, it may be utilized when necessary. As this Court noted in *Moor* v. *County of Alameda, supra*, there will inevitably be instances where federal law does not cover every issue which may arise in the course of a § 1983 action. In such instances, the courts may utilize state law "where federal law is unsuited or insufficient to furnish suitable remedies. . . ." [*Id.* at 703]. Accord, *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

The Respondents' misreading of *Erie R.R. Co.* v. *Tompkins, supra*, leads them to the incorrect conclusion that federal common law does not control the instant action [Brief of the Respondent at 18]. Yet, in *Moor* and *Sullivan,*[1] this Court clearly stated that federal law governs the instant action, and numerous circuit courts have held that the measure of damages in a § 1983 action is governed by federal common law. See, *e.g. Basista* v. *Weir*, 340 F.2d 74 (3d Cir., 1965); *Harrison* v. *United Transportation Union*, 530 F.2d 558 (4th Cir., 1975); *Martin* v. *Duffie, supra*; *Seaton* v. *Sky Realty Co.*, 491 F.2d 634 (7th Cir., 1974). See also, *Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir., 1977). See generally, Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Note, *Choice of Law Under Section 1983,* 37 U. Chi. L. Rev. 494, 506-512 (1970).

THE MEASURE OF DAMAGES IN § 1983 ACTIONS IS THE SAME WHETHER THE ACTION IS FILED IN FEDERAL OR STATE COURT.

The Respondents also suggest that had Ruby Jones filed her complaint in federal court, the measure of damages governing the case would be different [Brief of the Respondent at 19]. This argument completely ignores the doctrine of concurrent jurisdiction. Under this doctrine, both federal and state courts have jurisdiction to try cases brought pursuant to 42 U.S.C. § 1983. *Holland* v. *Perini*,

---

[1] The Respondents' argument that *Sullivan* has been rejected by this Court in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), is incorrect. In fact, in reaching its decision in *Runyon,* this Court cited *Sullivan.*

512 F.2d 93 (10th Cir., 1975), *cert. denied* 423 U.S. 994; *Long* v. *District of Columbia*, 469 F.2d 927 (D.C. Cir., 1972). Since jurisdiction is concurrent, state courts are bound to fully enforce federal rights. As this court stated in *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876):

> The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are . . . . Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights.

Accord, *Testa* v. *Katt*, 330 U.S. 386 (1947); *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912).

The doctrine of concurrent jurisdiction, of course, only applies in situations in which Congress has not withdrawn jurisdiction from state courts. However, as Congress has not so limited state jurisdiction in actions brought pursuant to the civil rights acts, Ruby Jones acted entirely properly in filing her claim in a state court, which had no alternative but to hear her case. Moreover, because federal law is the supreme law of the land, the state courts were without jurisdiction to limit the federal claim. See generally, 1 Moore's Federal Practice ¶0.6[3].[2]

[2] That federal claims can be brought in state court is, of course, salutory. The federal dockets are becoming steadily longer and the state courts' ability to hear federal claims thus provides a source of relief to the overburdened federal courts.

THE PETITIONER'S FEDERAL CLAIM IS NOT ONE FOR THE WRONGFUL DEATH OF THE SON, BUT FOR THE DEPRIVATION OF HER OWN CONSTITUTIONAL RIGHT.

The Respondent states that the Petitioner has "arrested not a claim for deprivation of rights secured by the Fourteenth Amendment, but a claim for wrongful death under the laws of Colorado." [Brief of the Respondents at 23]. This statement goes to the very heart of the Respondents' mistaken analysis of the law governing 42 U.S.C. §1983. While it is course true that the Petitioner stated a wrongful death claim in her first two claims for relief, her federal claim is separate and distinct. In his concurring opinion in *Monroe* v. *Pape*, 365 U.S. 167 (1961), Justice Harlan emphasized this point, stating:

> A deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy *even though the same act may constitute both a state tort and the deprivation of a constitutional right.* [*Id.* at 196; emphasis added].

Hence, the fact that Ruby Jones has a state cause of action does not bar her from seeking a remedy for the deprivation of her federal rights.

In the instant case, it is clear that Ruby Jones has stated a claim for relief under 42 U.S.C. §1983. This argument may be viewed from two perspectives. In the first place, the decisions of this Court indicate that a parent has a right to raise one's children. *Stanley* v. *Illinois*, 405 U.S. 465 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); and it is equally clear that the state may not deprive a person of his

parental rights without the due process of law. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). Moreover, it is particularly important to note that the integrity of the family has found protection in the due process and equal protection clauses of the Fourteenth Amendment. *Stanley* v. *Illinois, supra*.

The Civil Rights Acts were passed in 1871 specifically to enforce the then new Fourteenth Amendment. Thus, it is particularly appropriate that they should be used to remedy interference with parental rights,[3] for when Douglas Hildebrant shot Larry Jones in the back of the head, he terminated Ruby Jones' parental rights just as surely as if a court had done so without due process of law. It is clear that Douglas Hildebrant has deprived Ruby Jones of her constitutional right to raise her child. The Colorado wrongful death act provides no remedy for this deprivation; the Civil Rights Acts do.

That Ruby Jones has stated a federal claim may be seen from a second point of view. Some courts have held that the Civil Rights Acts are deficient with respect to the question of who may sue where state action has resulted in death. Consequently, these courts have held that state law may be used to fill the interstices of federal law. See *e.g.*, *Mattis* v. *Schnarr*, 502 F.2d 464 (8th Cir., 1964). Under this analysis one looks to the law of the state to determine whether or not a state statute gives the survivor an

[3] The Respondent's claim that 42 U.S.C. §1986 indicates that §1983 was not intended to apply to actions resulting in death. [Brief of the Respondents at 29] has been consistently rejected. See, *e.g.*, *Moor* v. *County of Alameda, supra*; *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir., 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir., 1961). See generally, Brief of the *Amici Curiae* at 24-31. A reading of §1986 shows its total inapplicability to a §1983 action since §1986 is concerned with people who fail to prevent conspiracies and not with the principal tortfeasor.

independent right to sue in her own name. Colorado has such a statute, Colo. Rev. Stat. Ann. §13-21-202 (1973), and there is no question that this statute creates an independent right in the survivor to sue on his own behalf. *Moffatt* v. *Tenney*, 17 Colo. 189, 30 P. 348 (1892)[4]

The Colorado wrongful death statute thus provides an alternative basis under which Mrs. Jones has standing to bring this federal action. As this Court has stated in *Sullivan* v. *Little Hunting Park, supra*, "The existence of a statutory right implies the existence of all necessary and appropriate remedies." 396 U.S. at 239. Since the Colorado wrongful death statute gives Ruby Jones a right to sue in her own name, she is entitled to sue under 42 U.S.C. §1983. *Perkins* v. *Salafia*, 338 F. Supp. 1325 (D. Conn., 1972).[5]

Nor is there any merit to the Respondent's claim that the Petitioner's argument would give a federal cause of action against public officials for "any tort they commit. . . ." [Brief of the Respondents at 25]. 42 U.S.C. §1983 is very limited

[4] Where a state has no such statute, the action is properly brought on behalf of the deceased's estate. *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir., 1974). Since Colorado has both a wrongful death statute, Colo. Rev. Stat. Ann §13-21-202 (1973), and a survivorship statute, Colo. Rev. Stat. Ann §13-20-101 (1973), the Petitioner could have sued either in her own name, or on behalf of Larry Jones' estate. She chose the first option. Cf. *Brazier* v. *Cherry, supra*.

[5] *Perkins* v. *Salafia, supra*, is valid insofar as it holds that where the state wrongful death law provides an independent right to sue in the name of the survivor, a §1983 action is proper. *Perkins* also stands for the proposition that where no such statute exists, and the state has only a survivorship statute, no federal cause of action exists. This second holding does not appear to be good law. See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Hall* v. *Wooten, supra*.

in its scope. It applies only to public officials who under the color of state law, intentionally subject a citizen to the deprivation of any constitutional right. This is much narrower than merely "any tort." Obviously, a public official who, driving carelessly, causes an automobile accident, is not liable for damages under § 1983, nor is a public official who defames someone liable under this statute. *Paul* v. *Davis*, 424 U.S. 693 (1976). But where, as in the instant case, a person, acting under color of State law, intentionally subjects a citizen to the deprivation of his civil rights, § 1983 provides a federal remedy.

JUSTICE IS LACKING IN THE CASE AT BAR, SINCE THE COLORADO COURTS HAVE RESTRICTED A FEDERAL STATUTE WITH AN ARCHAIC RULE OF DAMAGES.

The Respondent argues that, "Justice is not lacking in this case." [Brief of Respondents at 20]. This claim is as misguided as it is callous. Although Douglas Hildebrant intentionally shot and killed Ruby Jones' son, Larry, under the archaic Colorado law, she has been "compensated"by $1,500, $1,000 of which represents the cost of burying her son (A. 34). Of course, even this $1,000 must come from Mrs. Jones' own resources, since given the cost of modern litigation, she will never see a penny of the $1,500 awarded to her. Yet to the Respondents, this award was not unjust.

While the injustice of the present situation is obvious, Mrs. Jones would have no complaint if it at least resulted from a correct application of the law, but it does not. [6]

[6] In fact, the injustice of applying the state measure of damages precludes its incorporation into federal law. *Kaiser* v. *Kahn*, 510 F.2d 282 (2d Cir., 1974).

Petitioner filed a proper claim under a federal statute designed specifically to provide full compensation for the loss of her civil rights.

The Respondents seek to avoid the governing federal measure of damages by engrafting the Colorado net pecuniary loss rule onto the federal statute. They do so despite this Court's clear rejection of that rule. In *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974), the Court was confronted with the question of whether to limit the federal maritime law with the net pecuniary loss rule and, after an extended discussion, rejected that rule. The Petitioner can see no basis for reaching a different conclusion in the context of civil rights legislation. The Civil Rights Acts are remedial and were designed to provide a comprehensive remedy for the loss of constitutional rights. Consequently, they are to be liberally construed. *Green* v. *Dumke*, 480 F.2d 624 (9th Cir., 1973). Additionally, they were passed specifically to provide remedies where state remedies are inadequate. *Monroe* v. *Pape, supra.* Obviously, Colorado's net pecuniary loss rule has done nothing to compensate Mrs. Jones for the loss of her civil rights; it merely applies to the state death action. Under these conditions, this Court should reject the Respondents' attempt to engraft the net pecuniary loss rule upon § 1983 actions. Rather, this Court should apply the federal measure of damages to adequately compensate Mrs. Jones for the loss of her civil rights. *Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir., 1970).

Respectfully submitted,

WALTER L. GERASH
DAVID K. REES
Suite 2317, 1700 Broadway
Denver, CO 80290

Counsel for Petitioner

No. 76-5416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*

ROBERT A. MURPHY
RICHARD S. KOHN
NORMAN J. CHACHKIN
WILLIAM E. CALDWELL
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal
Defense & Educational
Fund, Inc.
145 Ninth Street
San Francisco, California 94103

NATHANIEL R. JONES
General Counsel, N.A.A.C.P.
1790 Broadway
New York, New York 10019

Attorneys for *Amici Curiae*

Of counsel:

AMITAI SCHWARTZ
Northern California
Police Practices Project
814 Mission Street
San Francisco, California 94103

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici curiae Lawyers' Committee for Civil Rights Under Law, Mexican American Legal Defense & Educational Fund, Inc., and National Association for the Advancement of Colored People respectfully seek leave to file the attached brief in order to assist the Court in resolving important issues affecting the right to recover meaningful damages in actions brought pursuant to 42 U.S.C. § 1983 to redress unconstitutional police misconduct causing death. In the attached brief, *amici* discuss several underlying questions which are critical to the

disposition of this cause but which *amici* do not believe will be addressed by the parties.

The interest of *amici* in this case grows out of their longstanding concern with the problem of devising remedies that will secure the effective enforcement of federal civil rights laws, and in particular their past and present involvement in litigation on behalf of minority citizens who have suffered injury or death at the hands of police officers.

Amici have sought consent to the filing of this brief but such consent has been refused by counsel for Respondents.

WHEREFORE, *amici* respectfully move that their brief be filed in this case.

Respectfully submitted,

ROBERT A. MURPHY
RICHARD S. KOHN
NORMAN J. CHACHKIN
WILLIAM E. CALDWELL
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal
Defense & Educational
Fund, Inc.
145 Ninth Street
San Francisco, California 94103

Of counsel:

AMITAI SCHWARTZ
Northern California
Police Practices Project
814 Mission Street
San Francisco, California 94103

NATHANIEL R. JONES
General Counsel, N.A.A.C.P.
1790 Broadway
New York, New York 10019

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Constitution and Statutes

Rules

Other Authorities

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5416

RUBY JONES,

Petitioner,

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*

Interest of *Amici Curiae*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, nine past Presidents of the American Bar Association, two former Solicitors General, a number of

law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been intimately involved in litigation on behalf of minority-race persons seeking redress for unconstitutional police conduct, especially the use of excessive physical force, including deadly force. This litigation has been based principally upon 42 U.S.C. § 1983, which derives from the Ku Klux Act of 1871. The Committee's experience is that broad principles of relief are essential to the fulfillment of that statute's goals. In particular, the rules of damages applicable to § 1983 litigation must not only assure complete compensation for personal injuries resulting from the unjustified use of excessive force by police officers; the rules must also assure that, in appropriate circumstances, exemplary damages will be awardable. The realistic possibility that egregious abuses of police authority may result in substantial damage awards is necessary if such unconstitutional conduct is to be deterred.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a privately-funded civil rights organization founded in 1968. MALDEF is dedicated to ensuring through law that the civil rights of Mexican Americans are protected. Over the past nine years MALDEF has represented or assisted Mexican Americans in a variety of cases brought under 42 U.S.C. § 1983 arising from violent abuse of police authority. MALDEF therefore has a significant interest in the continuing vitality of § 1983 as a legal remedy for the deprivation of federal rights.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. 42 U.S.C. § 1983 has been central to the NAACP's litigation efforts, especially those seeking redress for personal injury and death unnecessarily inflicted upon minority citizens by police officials under color of state law.

In the experience of *amici*, the unwarranted misuse of police power, including the unjustifiable use of deadly force, disproportionately strikes down minority Americans. In the present § 1983 case, brought in Colorado state court, a Denver police officer is charged with intentionally killing a fifteen-year-old black boy without reason. Astonishingly, the courts below have effectively determined that, under recovery rules which they deemed mandated by federal law, this unconstitutional death has a compensable value of $1,500. We are confident from our experiences and observations that almost any degree of physical injury short of death would have a higher value anywhere in the country, including Colorado. If the rule announced below is affirmed by this Court, therefore, the result will be that the Nation's law enforcement officers will be given an incentive to kill during the course of employing excessive force. Such a rule is intolerable, in our view; it seriously undermines our efforts to secure complete justice for our clients; and it repudiates the basic purposes of § 1983.

Amici thus have an interest in this dispute greater than that of the actual parties. In the remainder of this brief we address issues which may not be discussed by the parties, but which we believe are essential to the just disposition of this case. That disposition, in our opinion, requires reversal of the judgment below and a remand for the trial of petitioner's § 1983 claims.

STATEMENT OF THE CASE

On February 5, 1972, respondent Hildebrant, a white Denver, Colorado police officer, intentionally shot and killed petitioner's 15-year-old black son. Petitioner instituted this action against respondent Hildebrant and respondent City and County of Denver on October 15, 1973, in the State District Court for the City and County of Denver, seeking compensatory and punitive damages for the alleged unlawful killing of her son, and raising claims under both state and federal law.[1] In their answer respondents admitted the shooting, and admitted that respondent Hildebrant was acting within the scope of his office as a Denver law enforcement officer. Respondents denied, however, that petitioner's son was killed in violation of either state or federal law; respondents asserted as affirmative defenses that the killing was privileged because decedent was a fleeing felony suspect who could not have been apprehended without the use of deadly force, that respondent Hildebrant employed deadly force in self-defense, and that he used only that amount of force reasonably necessary under the circumstances.

[1] As amended, petitioner's complaint in the state trial court, as consistently construed by both the trial court and the Colorado Supreme Court, stated three claims for relief: (1) for battery under state law; (2) for negligence under state law; (3) for violation of federal constitutional rights. *See Jones* v. *Hildebrant*, 550 P.2d 339, 341 (Colo. 1976). The state courts treated the first two claims for relief as being authorized by the state wrongful-death statute, COLO. REV. STAT. § 13-21-202 (1973); the third claim was treated as one authorized by 42 U.S.C. § 1983. However, the complaint did not expressly refer to either the state wrongful-death statute or § 1983. The federal claim also makes no reference to specific provisions of the federal Constitution, but, fairly read, it alleges violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The lower courts in this case have uniformly construed this as a Fourteenth Amendment cause of action authorized by § 1983.

The case proceeded to trial on all of petitioner's claims. At the close of proof and before the case was submitted to the jury, however, respondents moved to dismiss petioner's federal (42 U.S.C. § 1983) claim. The trial judge granted the motion on the ground that the § 1983 claim merged with the state law claims, and that no relief different from that recoverable under the state-law claims was available under § 1983. The case thus went to the jury on petitioner's state-law claims only. On the issue of damages, the jury was instructed that petitioner was limited to recovering the net pecuniary loss she sustained as a result of her son's death, with a maximum allowable recovery of $45,000 (because petitioner was not a dependent of decedent); future earnings, loss of society, exemplary damages and the like were held to be unrecoverable under state wrongful-death law. The jury resolved the issues of liability under state law in petitioner's favor but returned a verdict of only $1,500 against respondents. The trial judge denied a motion for a new trial on the issue of damages.

On petitioner's appeal, the Colorado Supreme Court addressed a number of issues, *Jones* v. *Hildebrant*, 550 P.2d 339 (Colo. 1976), only a few of which are fairly comprised within the grant of certiorari. SUPREME COURT RULES 23(1)(c), 40(d)(1). With respect to petitioner's appeal on the limitations placed on damages recoverable under the state-law claims, the Colorado Supreme Court (1) declined to discard the "net pecuniary loss" rule first established in an 1894 decision of that court, and (2) upheld the $1,500 verdict as being adequate under that rule, 550 P.2d at 341-42. Neither of these issues is presented for review by this Court, nor could they be.[2]

[2] The court implicitly rejected petitioner's claim that the "net pecuniary loss" limitation on recovery under the state's wrongful-death statute was inconsistent with the Fourteenth Amendment.

As to petitioner's federal claim that her § 1983 cause of action was distinct from the state-created wrongful death action—and that it should not therefore have been "merged" with the state action nor dismissed by the trial judge [3]—the Colorado Supreme Court considered and decided four somewhat overlapping issues. At the outset, the court considered a contention by petitioner (viewed by the court as "confusingly stated") to the effect that petitioner's "civil right to her son's life," as recognized by the state wrongful-death statute, "was denied her without due process of law through his wrongful killing." 550 P.2d at 342. On the basis of this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), the court rejected this contention, holding that "where, as here, the state allows a plaintiff to bring her [wrongful-death] suit, she is not deprived of any of her civil rights without due process of law." 550 P.2d at 343. While we confess difficulty in understanding this issue,[4] it is a

---

550 P.2d at 342. This claim likewise is not pressed before this Court by the petitioner.

[3] Since petitioner's § 1983 claim was dismissed prior to submission of the case to the jury, there has been no determination that plaintiff's son was killed in contravention of the federal Constitution, as distinct from state law. The Colorado Supreme Court appears to have assumed that the facts as found by the jury also constituted a federal constitutional violation. In any event, this Court must, in the present posture of this case, make a similar assumption, as in all cases where a federal claim is dismissed prior to decision on the merits. It is sufficient to observe here that the Fourteenth Amendment expressly protects human life from wanton deprivation by the state. *See, e.g., Screws* v. *United States*, 325 U.S. 91 (1945). If petitioner prevails here, therefore, she will be entitled to a remand for trial of her § 1983 claims.

[4] Apparently petitioner's contention was: (1) that Colorado's wrongful-death statute created substantive property rights in a class of individuals bearing certain specified relationships to decedents; (2) that these rights were protected by the Fourteenth Amendment; and (3) that in a § 1983 wrongful-death action, the state "net pecuniary loss" rule could not be applied without infringing those substantive property rights in violation of the Four-

constitutional claim which need not be determined in order to reach the question presented for review by this Court, and it is not fairly comprehended within the grant of certiorari.

The next three issues decided by the Colorado Supreme Court are, however, properly embodied within the question presented for review here, for they involve interpretations of § 1983 which led the court below to conclude that § 1983 was identical in purpose and effect to the Colorado wrongful-death statute. First, the court attempted to determine the federal law of damages applicable to § 1983 wrongful-death actions brought in Colorado federal courts. Reviewing a number of lower federal court decisions which had utilized 42 U.S.C. § 1988 to "incorporate" relevant state survival and wrongful-death statutes into § 1983 actions brought in federal court, the Colorado Supreme Court concluded

> that Colorado's wrongful death remedy would be engrafted into a § 1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the § 1983 claim should be dismissed.

---

teenth Amendment. Petitioner may have relied, incorrectly, upon the previous decision in *Fish* v. *Liley*, 120 Colo. 156, 208 P.2d 930 (1949) to support her assertion that the wrongful-death statute created a "property right." In the instant case, however, the Colorado Supreme Court rejected that assertion and characterized the wrongful-death statute as "remedial," 550 P.2d at 344, creating only a "right to sue" at law for a tort which, under *Paul* v. *Davis*, 423 U.S. 693 (1976), was distinguishable from a "property right." In any event, since petitioner has not pressed her attack upon the "net pecuniary loss" limitation of the state claim (*see* note 2, *supra*), this issue also does not seem to be presented for this Court's review.

> Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.

550 P.2d at 344 (footnotes omitted). Second, the court rejected petitioner's argument that there is a § 1983 wrongful-death remedy independent of state law. The court based its conclusion "on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts." *Id.* at 345 (footnote omitted). Third, the court held that "one may not sue for the deprivation of another's rights under § 1983 . . ." and that petitioner "therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action." *Id.*

Two Justices dissented on the ground that "Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death [does not] appl[y] to actions founded upon 42 U.S.C. § 1983 (1970)." *Id.* at 345-46. It is this question framed by the dissenting Justices, and the issues fairly comprised therein, that are before the Court pursuant to its grant of certiorari.

SUMMARY OF ARGUMENT

I

This case presents important questions of federal law concerning the fashioning of appropriate relief in actions brought pursuant to 42 U.S.C. § 1983 alleging that unconstitutional state action caused human death. The precise question presented for review—"what is the measure of damages" in such an action—arises (as the phrasing in the Petition for Certiorari indicates) in the con-

text of a *state* court disposition of a § 1983 claim which the Colorado courts are willing and able to entertain. However, the court below clearly understood that it was considering and deciding questions of *federal* law in determining that the measure of damages in a § 1983 wrongful-death action was the same as that in the state wrongful-death claim. There are no considerations of comity or federal-state tensions which affect the disposition of the *federal* questions presented in this case, which is in the same posture as if it had been brought in the United States District Court for the District of Colorado and federal judges below selected the Colorado "net pecuniary loss" rule as the measure of damages in a § 1983 action.

II

The court below was correct in deciding another issue implicit in the question presented for review here: whether § 1983 authorizes a cause of action to be prosecuted when constitutional wrong results in death. Although the parties may not address this issue, this Court's disposition of the major question may necessarily decide it, and *amici* therefore discuss it. As we show, the lower federal courts and the Colorado courts in the instant case have uniformly recognized a § 1983 action for wrongful death resulting from unconstitutional action, though on the basis of differing rationales. The result in these cases is clearly correct, and this Court should have no hesitation in affirming the determination of this issue by the Colorado Supreme Court in order to reach and decide the important remedial question which is the major subject of controversy in this case.

III

The court below was of the view that while petitioner was entitled to utilize the process of Colorado's wrongful-death statute in order to maintain a § 1983 action against

respondents, she was also required to accept the severe limitations on damages embodied in that statute, as judicially construed. The plain meaning of this ruling, in the context of this case, is that even if petitioner's 15-year-old son was killed in violation of the Fourteenth Amendment, such constitutional injury has a compensable value of $1,500. This ruling is untenable. If petitioner prevails on the merits of her § 1983 claim she is entitled to have the Colorado courts award a federal measure of relief commensurate with (1) prevailing notions of complete justice, and (2) the dual remedial purposes of § 1983's private-enforcement scheme: just compensation and deterrence of unconstitutional conduct on the part of state officials. As a general matter of federal law, principles of damages applicable to § 1983 cases must encompass all elements of the particular constitutional injury, and must also reflect the statute's exemplary goals. Colorado's "net pecuniary loss" rule is inconsistent with these applicable principles. Uniform federal rules of recovery in § 1983 actions are essential; there is no basis for the requirement imposed below that the damages rules embodied in the state's wrongful-death statute must be applied in federal § 1983 actions.

IV

If the Court should hold that reference to state wrongful-death and survival statutes in § 1983 actions must carry with it the state-created limitations on damages, then this Court should reject the use of state law in its entirety and create a federal common law of wrongful death applicable to actions under the Act, as the Court has done in other important areas of federal jurisprudence.

ARGUMENT

I. The Colorado Courts Properly Entertained This § 1983 Suit, Though They Were Required To Apply Federal Law In Determining Its Outcome.

This case presents an opportunity for the Court to decide a heretofore unresolved question: whether state courts may entertain actions brought under 42 U.S.C. § 1983. *See Aldinger* v. *Howard*, 96 S. Ct. 2413, 2430 n. 17 (1976) (dissenting opinion). *Amici* think the answer is that they may. The heart of this case is 42 U.S.C. § 1983 which, together with its jurisdictional counterpart, 28 U.S.C. § 1343(3), derives from § 1 of the Ku Klux Act of 1871.[5] The overriding purpose of that en-

---

[5] As originally passed, § 1 of the 1871 Act, 17 Stat. 13, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

The cause-of-action and jurisdictional parts of § 1 of the Ku Klux Act are now separately codified, the former being 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, sub-

actment was to provide a federal forum for the enforcement of the then-recent federal rights conferred by the Fourteenth Amendment (1868). *Monroe* v. *Pape*, 365 U.S. 167 (1961). The legislative history of the Ku Klux Act reveals that Congress, rather than seeking to utilize the state courts as the primary enforcers of the Fourteenth Amendment, was displeased with those courts because of their past failures.[6] Some state courts have refused to entertain § 1983 actions precisely because of that perceived congressional hostility.[7] But the constitutional correctness of those decisions is not at issue here,[8]

---

jects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdictional provision is now 28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The evolution process is informatively traced in *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974).

[6] *See generally Monroe* v. *Pape*, *supra*, 365 U.S. at 174-80. The mood of Congress and its attitude toward state courts was accurately summed up by Representative Voorhees, an opponent of the Act, including its provisions conferring federal-court jurisdiction: "This is to be done upon the assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law." CONG. GLOBE, 42d Cong., 1st Sess., App. 179.

[7] *See, e.g., Chamberlain* v. *Brown*, 442 S.W.2d 248 (Tenn. 1969).

[8] Section 1983, of course, is in principal function a federal-court jurisdictional vehicle for civil actions arising under the

for the Colorado courts have not expressed unfriendliness toward petitioner's § 1983 claims. Indeed, the Colorado Supreme Court's opinion in this case appears unqualifiedly receptive to petitioner's § 1983 arguments, and the court made a creditable attempt, albeit an erroneous one in our view, to interpret and apply federal law.[9]

With this background, the only state court/federal law question that could remain is whether, contrary to the Colorado Supreme Court's assumption, state courts

---

Fourteenth Amendment (or, to be more precise, under "the Constitution and laws"). Section 1983 aside, it is difficult to perceive, given the Supremacy Clause (indeed, given the plain language of the Fourteenth Amendment itself), how a state court of general jurisdiction could, as in cases such as the one cited in note 7, *supra*, refuse to receive an action to vindicate Fourteenth Amendment rights. Any contention that such state power exists would seem to have "been resolved by war" to the contrary. *Testa* v. *Katt*, *supra*, 330 U.S. 386, 390 (1947). But, as we say, that issue is not implicated here.

[9] This case does not involve any of the knotty conflicts between state courts and federal law which have arisen from time to time over the years. Accordingly, we take a moment to identify what is not at issue here. In general, this case presents none of the more difficult problems flowing from Mr. Justice Bradley's benchmark post-Civil War decision in *Claflin* v. *Houseman*, 93 U.S. 130 (1876), holding that federally-created rights could be vindicated in state courts with competent jurisdiction. More specifically, this case is not one in which the state court, by virtue of some uniformly-applied procedural rule pertaining to access to it, has refused to entertain a federal cause of action. *Cf. Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950) (Frankfurther, J.); *Douglas* v. *New York, N.H. & H.R.R.*, 279 U.S. 377 (1929) (Holmes, J.). Nor is this case one in which Congress has created a cause of action and conferred concurrent enforcement jurisdiction on the federal and state courts, but state-court jurisdiction is refused on grounds which discriminate against the cause of action solely because of its federal source. *Cf. Testa* v. *Katt*, 330 U.S. 386 (1947) (Black, J.); *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) (Brandeis, J.); *Second Employers' Liability Cases* (*Mondou* v. *New York, N.H. & H.R.R.*), 223 U.S. 1 (1912). And, manifestly, this case is not one in which Congress has attempted to force upon the state courts the duty to enforce a federal law. *Cf. Brown* v. *Gerdes*, 321 U.S. 178, 191 (1944) (Frankfurter, J., concurring).

lack authority to adjudicate § 1983 cases. In other words, are § 1983-Fourteenth Amendment causes of action matters, either expressly or by necessary implication, within the exclusive province of federal judicial power? Last Term three members of this Court expressed the view "that § 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts." *Aldinger* v. *Howard*, *supra*, 96 S. Ct. at 2430 n. 17 (1976) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). That view, in our judgment, is unassailable in the light of established precedent. Without a case in this Court squarely on point, it would be difficult to find a more closely analogous decision than that in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

Charles Dowd involved a labor-contract suit initiated in state court. By § 301(a) of the Labor Management Relations Act of 1947, however, Congress had provided that such suits "may be brought in any district court of the United States. . . ." *See id.* at 502. Section 301 was produced by circumstances not unlike those that gave birth to § 1983—namely the inadequacy or unavailability of state-court remedies:

> A principal motive behind the creation of federal jurisdiction in this field was the belief that the courts of many States could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations.

Id. at 510. Moreover, in *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957), this Court had held that § 301 cases brought in federal courts were to be governed by federal rather than state law, a proposition that inescapably obtains in § 1983-Fourteenth Amendment cases. The contention was accordingly made in *Charles Dowd* that even though § 301 did not expressly provide for exclusive federal-court jurisdiction, federal exclusivity must necessarily be implied from the *Lincoln Mills*-§ 301 scheme as it had been implied in other cases.[10] The Court unanimously rejected the argument in an opinion authored by Mr. Justice Stewart. Upon examination of the legislative history, the Court found that "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." *Id.* at 511. Congressional purpose was to submit § 301 problems " 'to the usual processes of the law.' " *Id.* at 513. This legislative history coupled with Justice Bradley's *Claflin* v. *Houseman*[11] test—that the state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case" (93 U.S. at 136)—led the Court in *Charles Dowd* to the inevitable conclusion that the state courts enjoyed jurisdiction concurrent with that of the federal courts in § 301 cases.

A similar analysis leads to the same conclusion with respect to the authority of the state courts to hear § 1983 cases. We have found nothing in the legislative debates manifesting a congressional desire to deprive the state courts of jurisdiction in Fourteenth Amendment cases. While it is true that Congress was displeased with the performance of state courts in this regard (*see* note 6, *supra*), it is also clear that Congress understood that Fourteenth Amendment rights could be vindicated in the state courts, as rights secured by the Contracts Clause, for example, had been historically, with ultimate federal

---

[10] *See, e.g., San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Garner* v. *Teamsters, C. & H. Local Union*, 346 U.S. 485 (1953); *Brown* v. *Gerdes*, 321 U.S. 178 (1944).

[11] *See* note 9, *supra*.

protection provided in the form of review by this Court under § 25 of the Judiciary Act of 1789.[12] Yet, there is no indication whatsoever that Congress intended § 1 of the Ku Klux Act to deprive the state courts of power to decide Fourteenth Amendment cases. It simply chose the federal judiciary, which it viewed as being less susceptible to the pressures of popular passions than the state court systems, as the primary forum for the adjudication of individual federal rights[13]—primary but, at the litigant's option, not exclusive.[14]

The language of § 1983's jurisdictional grant, 28 U.S.C. § 1343(3), also fails to support an argument for exclusivity. There is no difference between the language of § 301 considered in *Charles Dowd* and that of § 1343 sufficient to require a different conclusion. The principal difference is that § 301 spoke in terms of "may" (labor-contract cases "*may* be brought in any district court of the United States"), while § 1343's preamble speaks in terms of "shall" ("[t]he district courts *shall* have original jurisdiction" of the enumerated civil actions, including those authorized by § 1983).[15] But the "shall" mandate simply obliges federal courts to receive § 1983 cases; it does not preclude the state courts from also

[12] *See Monroe* v. *Pape*, *supra*, 365 U.S. at 194-98 (Harlan, J., concurring).

[13] *See, e.g., Steffel* v. *Thompson*, 415 U.S. 452 (1974); *District of Columbia* v. *Carter*, 409 U.S. 418 (1973); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972); *Mitchum* v. *Foster*, 408 U.S. 225 (1972); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

[14] When the Congress of these times desired to confer exclusive federal jurisdiction, it knew how to do it expressly. *See* note 36, *infra*, for example.

[15] The original jurisdictional language, as it appeared in § 1 of the Ku Klux Act (*see* note 5, *supra*) authorized an appropriate "action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States. . . ."

entertaining them. That is the teaching, without exception, of the *Claflin* v. *Houseman* line of cases.

State courts are thus free to contribute to § 1983-Fourteenth Amendment jurisprudence. Of course, in the contribution process it is federal law rather than state law which they must expound. The Court made that clear enough when later in the same Term that produced *Charles Dowd* it rejected a state-court determination that state courts could apply state law in § 301 cases. *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). That conflict, however, is not presented by the decision below in this case, as the Colorado Supreme Court made a straightforward effort to determine and apply federal law. The case is thus in no different posture for decision-making purposes than it would be had it arrived here from a lower federal court. The Court's task in this case, as in the numerous previous state-court cases requiring the application of federal law by this Court,[16] as well as the many federal cases in which the Court has been required to develop federal law,[17] is to decide what federal law is or ought to be and apply it to the case. That such cases may occasionally arise in the state courts is an asset rather than a liability; it is good constitutional law and, consequently, good federalism. As Mr. Justice Stewart put it in *Charles Dowd* (368 U.S. at 514) (footnote omitted):

> It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of

[16] *See, e.g., Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *Local 174* v. *Lucas Flour Co.*, *supra*; *Farmers Educ. Cooperative Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942); and other cases discussed in Argument IV, *infra*.

[17] *See, e.g.*, cases and authorities discussed in Argument IV, *infra*.

federal common law of which *Lincoln Mills* spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.

II. Civil Actions May Be Maintained Under 42 U.S.C. § 1983 By Persons, Such As Petitioner Here, Who Seek To Redress Unconstitutional State Action Resulting In Human Death.

Although this Court has never addressed the question,[18] the lower federal courts are in unanimous agreement that death does not abate a pending § 1983 cause of action nor prevent the bringing of such an action for unconstitutional conduct which causes death.[19] These courts

---

[18] In *Moor* v. *County of Alameda*, 411 U.S. 693, 702 n.14 (1973), the Court noted, without approval or disapproval, that the lower federal courts had applied "state survivorship statutes" in § 1983 cases. In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the Court considered other problems in a § 1983 wrongful-death case without alluding to any of the questions present here.

[19] At common law, death gave rise to no cause of action and terminated all those for personal torts. As described by this Court in *Moragne* v. *States Marine Lines, Inc.*, 393 U.S. 375 (1970), the reason can be traced to the felony-merger doctrine, under which the penalty for committing a felony included the forfeiture to the Crown of all property owned by the wrongdoer. The harshness of the doctrine has been substantially ameliorated by the passage of statutes both in England and in this country. While these statutes vary widely in their terms and scope, most legislative schemes create two separate and distinct causes of action. The first, termed "survival" statutes, generally permits recovery by the decedent's executor of damages which accrued from the injury prior to the death of the decedent. *See Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 575 n.2 (1974). The second, generally described as "wrongful-death" statutes, permits the heirs to bring suit subsequent to the decedent's death for the loss to them. *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 24.1-24.3 (1956), C. MCCORMICK HANDBOOK ON DAMAGES § 12 (1935). Colorado has enacted both

have uniformly considered themselves obligated by established principles to fashion a federal law of wrongful death and survival in § 1983 cases.[20] To be sure, these courts also frequently utilize 42 U.S.C. § 1988 (which we discuss below) as a vehicle by which to utilize state wrongful-death and survival provisions. But when relevant state law is absent or found wanting, the courts proceed to shape a suitable federal rule.[21] *Amici* believe

---

types of statutes; the wrongful-death action is created by COLO. REV. STAT. § 13-21-202 and the survival statute is § 13-20-101. An action under the survival statute does not preclude an action for wrongful death. *Id.*, § 13-20-101(1). The former must be brought by the executor of the decedent's estate, but the latter may be brought by certain designed survivors. Some states permit survival actions to be brought by the executor of the estate for damages even where death is instantaneous. Colorado apparently is not one of these. *See Publix Cab Company* v. *Colorado National Bank of Denver*, 139 Colo. 205, 338 P.2d 702, 706 (1959). The difference between wrongful-death and survival statutes is discussed in W. PROSSER, LAW OF TORTS, §§ 126, 127 (4th ed. 1971); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965).

Since petitioner's decedent died instantly, this suit was commenced under the Wrongful Death Statute and not the survival statute. Petitioner sued individually as the mother of the decedent and not as the administratrix of her son's estate. Thus, as the complaint made clear, the suit, insofar as it states a claim under 42 U.S.C. § 1983, asserts a cause of action on the basis of the alleged unlawful killing of petitioner's son.

[20] *See, e.g., Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Mattis* v. *Schnarr*, 502 F.2d 588, 593 (8th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pritchard* v. *Smith*, 289 F.2d 153 (8th Cir. 1961); *Smith* v. *Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *James* v. *Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975); *Evain* v. *Conlisk*, 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd*, 498 F.2d 1403 (7th Cir. 1974); *Perkins* v. *Salafia*, 338 F. Supp. 1325 (D. Conn. 1972); *Salazar* v. *Dowd*, 256 F. Supp. 220 (D. Colo. 1966); *Cinnamon* v. *Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963); *Davis* v. *Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955).

[21] *See, e.g., Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (Wisdom, J.).

that this result is wholly sustainable as a rightful part of the business of judging in a federal system, quite apart from § 1988 or state law.

A. *Section 1983 Creates A Constitutional Cause of Action Wholly Apart From State Tort Law.*

Section 1983-Fourteenth Amendment actions at law are inherently distinct from state tort actions and, for that matter, any other type of legal action that does not concern personal rights guaranteed by the Constitution. We are confirmed in this view by all of this Court's § 1983 decisions from *Monroe* v. *Pape*, 365 U.S. 194 (1961) through *Paul* v. *Davis*, 424 U.S. 693 (1976). Those decisions instruct that the facts which make out a § 1983 cause of action may coincidentally constitute a state-law tort or some other violation of state law, but that conduct unlawful under state law does not *ipso facto* establish the components of a § 1983 case. The failure to perceive this critical distinction is at the bottom of the Colorado Supreme Court's erroneous conclusion that petitioner's § 1983 claim merged with her state-law claims.

The inherently unique nature of a § 1983 case derives not solely from the "under color of law" element, *see Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), although this is the ingredient that in the first instance distinguishes § 1983 from common-law tort doctrine. The more important difference, in cases such as this, is the fact that § 1983 is a vehicle for the vindication of individual constitutional rights guaranteed by the Fourteenth Amendment.[22] As Mr. Justice Harlan explained in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196 (concurring opinion), "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." It is because constitutional rights are involved that the interests protected by § 1983 transcend the values with which the general common law is concerned. The district court's decision in *Shaw* v. *Garrison*, 391 F.Supp. 1353 (E.D. La. 1975), *aff'd*, 545 F.2d 980 (5th Cir. 1977), illustrates the distinction. There Judge Heebe refused to allow a pending § 1983 action to abate because of the death of the plaintiff, although under state law governing actions for libel, slander or malicious prosecution the death of the plaintiff would have abated the action. The inherent difference between § 1983-Fourteenth Amendment actions and state-tort actions was critical to Judge Heebe's decision (391 F.Supp. at 1364 n.17):

> The fact of the matter is that this is not a state action for libel, slander or malicious prosecution, but a federal action for violation of plaintiff's civil rights. We have already determined that the purposes underlying this statute require that the action not abate, if there is some proper mechanism for survival. The fact that some states may have a different policy for a cause of action based on the same facts yet differently characterized should not be binding on a federal court construing civil rights actions.

It is not only § 1983's concern with constitutional rights, however, that makes it intrinsically unique. For there is the added factor of the statute's great remedial design. It is thus because of the overriding *constitutional* remedial purpose of § 1983's private enforcement scheme —designed both to compensate for and to deter constitutional injury—that causes of action thereunder require

[22] This case does not involve the "and laws" portion of § 1983.

a special place in the litigation hierarchy.[23] It is, in

[23] As stated in Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX.L.REV. 1015, 1026 (1967):

> [T]he basic policy behind tort law is compensation for physical harm to an individual's person or property by shifting losses from the one injured to the one perpetrating the injury, while the underlying policy of the civil rights statutes is quite different. The legislative intent behind these statutes is not entirely certain since other provisions of the Act of 1871 received far more attention in congressional debate than did those that eventually became sections 1983, 1985, and 1986. One purpose of the Act apparently was to provide a federal forum for rights that the disorganized Southern state governments were not protecting adequately. It seems clear, however, from the statements of a few legislators, the title of the Act itself, and the circumstances surrounding its passage that the Act's primary purpose was to enforce the fourteenth amendment by providing a positive, punitive civil remedy for acts of racial discrimination. Thus an award of damages would depend not on the common-law test of whether a plaintiff had suffered a measurable physical or economic injury, but on whether the defendant's conduct came within the scope of actions that the statutes were intended to penalize. While traditional tort law damages rules may be appropriate to accomplish some of the civil rights statutes' purposes, the tort-law rules do no [*sic*] allow full realization of those purposes because of their emphasis upon loss-shifting rather than upon punishment and deterrence. [footnotes omitted]

Since § 1983 and common-law tort concepts protect different interests, and concern different legal relationships, a plaintiff injured in both respects may maintain separate suits in both state and federal courts, even though both wrongs arise out of the same occurrence. Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DENVER L.J. 480, 481, 483 (1966). Or, both the state and federal claims may be combined in a single suit in state court, as here; or, with certain limitations, both claims may be brought in one suit in federal court, with the state claim cognizable under the doctrine of pendent jurisdiction. *Aldinger* v. *Howard*, 96 S. Ct. 2413 (1976). This does not mean, of course, that double recovery will be permitted for the same elements of injury. *See Stringer* v. *Dilger*, 313 F.2d 536, 541-42 (10th Cir. 1963); *Rue* v. *Snyder*, 249 F. Supp. 740, 743 (E.D. Tenn. 1966); *see generally* Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1029-30 (1967). *Cf. Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974). Thus, in the instant case, the jury (had petitioner's § 1983 claims

other words, the superior quality of these "federally protected rights" that calls into play the intense judicial scrutiny not normally associated with the legal relationships governed by the general common law as developed by the states. *See Bell* v. *Hood*, 327 U.S. 678, 684 (1946). That the statute is preoccupied with remedy is made plain from the congressional debates on both the Fourteenth Amendment and its principal enforcement mechanism, the Ku Klux Act, from which § 1983 derives. It was repeatedly asserted that equal rights and the privileges and immunities of citizens were being denied by the states, "and that without remedy." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (Remarks of Rep. Bingham with reference to § 1 of the proposed Fourteenth Amendment). And the opponents contended that the majority of Congress were willing "to overturn the whole Constitution to get at a remedy for these people." *Id.* at 499 (Sen. Cowan). The Ku Klux Act which Congress debated in the Spring of 1871 did not "overturn the whole Constitution," but there can be no doubt that its central thesis was to provide a supervening federal remedy for denial of the fundamental rights which the Fourteenth Amendment was designed to secure as against the states. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess., App. 85 (Rep. Bingham, the author of § 1 of the Fourteenth Amendment).

With respect to this central remedial theme, and importantly for this case, it is clear that Congress did not intend to place death-dealing constitutional injury beyond the reach of the statute. Quite simply, "it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to

been submitted to the jury) could have been instructed that if the defendants were found liable under both the state and federal claims, the verdict under § 1983 could not reflect the "net pecuniary loss" damages recoverable under the state causes of action.

withdraw the protection of civil rights statutes against the peril of death." *Brazier* v. *Cherry*, *supra*, 293 F.2d at 404.[24] Indeed, President Grant's message to Congress, which inspired the Ku Klux Act, was predicated upon "[a] condition of affairs [that] now exists in some States of the Union rendering *life* and property insecure . . . ." CONG. GLOBE, 42d Cong., 1st Sess. 244 (emphasis added); *see Monroe* v. *Pape*, *supra*, 365 U.S. at 172. And hardly a page of the debates passes without at least one reference to murder, lynchings and other modes of killing. It was the purpose of the Ku Klux Act to provide federal protection for "life, person and property," CONG. GLOBE, 42d Cong., 1st Sess. 321, 322 (Rep. Stoughton); it was an effort to attain "that twilight civilization in which every man's house is defended against murder and arson. . . ." *Id.* at 370 (Rep. Monroe). The debates are replete with such references. *See also*, *e.g.*, *id.* at 374 (Rep. Lowe), 428 (Rep. Beatty), quoted in *Monroe* v. *Pape*, *supra*, 365 U.S. at 175.

On the other hand, there is nothing in the debates to support a contention that § 1 of the Act (now § 1983) was intended to limit the authorized civil action by the "person injured" to those circumstances where death does not occur.[25] The only contrary argument we are aware

[24] The *Brazier* court went on to point out that "[t]he policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which could cripple." 293 F.2d at 404. As the court observed in *Davis* v. *Johnson*, 138 F. Supp. 572, 574 (N.D. Ill. 1955), a contrary holding "would encourage officers not to stop after they had injured but to be certain to kill." *See also* W. PROSSER, LAW OF TORTS § 127 at p. 902 (4th ed. 1971).

[25] Some courts, in fact, have held that the decedent's executor is a "person injured" within the contemplation of § 1983. *See*, *e.g.*, *Davis* v. *Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955); *cf. Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

of is the one, consistently rejected,[26] contending that by expressly providing for wrongful-death actions in § 6 of the Ku Klux Act (now 42 U.S.C. § 1986),[27] Congress implicitly evidenced its desire to deny wrongful-death

[26] *See*, *e.g.*, *Hall* v. *Wooten*, *supra*, 506 F.2d at 568-69 n.3; *Brazier* v. *Cherry*, *supra*, 293 F.2d at 404.

[27] Section 6 of the Ku Klux Act, 17 Stat. 13, originally provided as follows:

> That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: *Provided* That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

As codified in 42 U.S.C. § 1986, the wrongful-death provision of the statute reads:

> and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

The "second section of this act" referred to in the original § 6 is now 42 U.S.C. § 1985, insofar as it authorizes civil actions against those affirmatively engaged in conspiracies to violate civil rights. *See generally Griffin* v. *Breckenridge*, 402 U.S. 88 (1971).

actions under § 1.[28] This is more than the process of

[28] As we point out in the text following this note, § 1 of the Act was not the cause of most of the controversy during the Ku Klux debates. Hence, it is very tenuous to draw inferences about § 1 from what happened with other parts of the bill, especially § 6. The Act originated in the House as H.R. 320, where it passed and was sent to the Senate by a vote of 118 to 91. CONG. GLOBE, 42d Cong., 1st Sess. 522. During the course of the Senate debates, Senator Sherman introduced an amendment which would have imposed civil liability for personal injuries and property damages resulting from the conduct of "any persons riotously and tumultuously assembled together" upon all of "the inhabitants of the county, city or parish" wherein such injury or damage occurred. *Id.* at 663. The proposed Sherman amendment also provided that such "riot damages" would be payable "to the person or persons damnified by such offense if living, or to his widow or legal representative if dead." *Id.* This was the first time a wrongful-death provision expressly appeared in the Ku Klux Act or any of its proposed amendments, yet there is no explanation for it. Although the Sherman amendment was adopted in the Senate (by a vote of 39 to 25) without debate (*id.* at 705), and was thus added to the Senate version of the Act, it ran into a storm of opposition in the House, as outlined in *Monroe* v. *Pape*, *supra*, 365 U.S. at 188-90. The House refused to concur in the Sherman amendment, by a vote of 132-45, and the bill was referred to House-Senate conference. CONG. GLOBE, *supra*, at pp. 725, 728. A modified version of the Sherman amendment was worked out in conference and sent to both the House and Senate. This revised version (*see id.* at 749) provided that the actual wrongdoers must also be joined in an action authorized by the amendment; it prevented, in Representative Shellabarger's words, "a claimant entitled to recover from resorting to property of individuals at all and confin[ed] his right of recovery to the county or city in which the mischief was done," *id.* at 751; it provided that the city or county would be liable only to the extent a judgment could not be satisfied against the actual wrongdoers; and it continued the wrongful-death authorization from the first version. The conference report containing this revised version of the Sherman amendment again passed the Senate (by a vote of 32-16, *id.* at 779), but also again failed in the House (106 to 74). *Id.* at 800-01. A new conference was convened, and it was at this second conference that § 6 of the Act was first proposed (*see id.* at 804). The second conference report containing § 6 (now 42 U.S.C. § 1986, *see* note 27, *supra*) ultimately passed both the House (97 to 74) (*id.* at 808) and the Senate (36-13). *Id.* at 831. Relevant to the present discussion, the § 6 compromise also contained a wrongful-death provision, though it was altered from the earlier Sherman proposals to include a one-year

negative implication will bear—for several reasons. First, it is indeed "odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death." *The Tungus* v. *Skovgaard*, 358 U.S. 588, 608 (1959) (Brennan, J., dissenting). Second, the negative-implication argument overlooks the facts that § 1 of the Ku Klux Act was not the primary focus of controversy (*see Adickes* v. *S. H. Kress & Co.*, *supra*, 398 U.S. at 164-65; *Monroe* v. *Pape*, *supra*, 365 U.S. at 364-65), and that the political bartering process extant in 1871 was not conducive to "achieving legislative patterns of analytically satisfying symmetry." *Id.* at 248 (Frankfurter, J., dissenting). Third, the argument neglects the importance of the fact that § 6 was negotiated into the Act after § 1 had passed both houses of Congress by safe margins (*see* note 28, *supra*). And, finally, this Court in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393-402 (1970), unanimously rejected a similar argument based on considerably stronger historical evidence.

statute of limitations and a $5,000 ceiling on recoverable damages. The debates shed virtually no light on why § 6 specifically authorized wrongful-death actions but the other sections did not. The only discussion of the wrongful-death provision appears in the remarks of Representative Shellabarger, where he offers his view that the wrongful-death provision in § 6 will "operate back upon the second section [now 42 U.S.C. § 1985, *see* note 27, *supra*]," whose failure to contain such a provision was a "defect" in that section. *Id.* at 805. At most, this rather sparse history, coming from one among many who debated the Act, is inconclusive. Just why the Sherman proposals, which form § 6's background, contained a wrongful-death authorization is obscure; although it seems plausible that these rather startling propositions called for special consideration because they created causes of action, in the view of many of the opponents, theretofore unheard of in the law. *Cf. Baker* v. *F. & F. Investment Co.*, 420 F.2d 1191, 1195 (7th Cir.), *cert. denied sub nom. Universal Builders Inc.* v. *Clark*, 400 U.S. 821 (1970). But whatever the explanation, § 1 had already passed beyond any point of controversy, and there is simply no basis for drawing inferences about § 1 from what happened in connection with the hotly contested proposals which became § 2 and § 6.

Thus, whatever the reason for Congress' failure to expressly provide for § 1983 wrongful-death actions in 1871, it is simply impossible to infer that they silently intended to deny for all time the availability of such suits. Many of the men who comprised the Congress during these days were notably competent lawyers,[29] and it is highly unlikely that they did not understand the full ramifications of their grant of an "action at law." [30] The debates reveal that they were students of the common law; that they were knowledgeable about how it had developed and, presumably, how it would continue to develop. When they chose, as they clearly did, to entrust the vindication of Fourteenth Amendment rights to the federal judiciary with "all the power of its courts," CONG. GLOBE, 42d Cong., 1st Sess. 578 (Sen. Trumbull), 609 (Sen. Pool), they therefore most assuredly knew what they were doing.

Regardless of their understanding or assumptions about the availability of wrongful-death actions in 1871,[31]

---

[29] *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 366-67 & n.22 (1959).

[30] In § 3 of the Enforcement Act of May 31, 1870, 16 Stat. 140, the Congress authorized "an action on the case," revealing its understanding of torts not committed by force. *See* BLACK'S LAW DICTIONARY 51 (4th ed. 1957). And in § 15 of the Force Act of February 28, 1871, 16 Stat. 433, for another comparative example, Congress referred to "all cases in law or equity" and provided for a "suit for damages" for injury to person or property.

[31] The common law of England adopted by the States provided for the survival of certain actions, *see Moore* v. *Backus*, 78 F.2d 571, 573-75 (7th Cir. 1935) and state wrongful-death statutes were not uncommon in those days, *see Mobile Ins. Co.* v. *Brame*, 95 U.S. 754 (1878). The common law rule that death gives rise to no cause of action is *not* simply an aspect of the rule that personal actions die with the person. It is of later vintage and its origin has been described as a "judicial accident." Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND.L.REV. 605, 609 (1960). Lord Ellenborough's declaration in *Baker* v. *Bolton*, 1 Camp, 493, 170 Eng. Rep. 1033 (1808) came in a *nisi prius* case of little moment

without benefit of any reasoning or supporting authority. This fiat may have reflected confusion over the effect of the maxim that personal actions die with the person or from unwarranted assumptions regarding the felony-merger doctrine. *Id.* at 614-615. It was not generally followed either here or in England.

The first case in this country denying a cause of action for death was in 1848. Malone, *The Genesis of Wrongful Death*, 17 STAN.L.REV. 1043, 1066 (1965). American colonial courts commonly provided compensation to bereaved families in cases of negligent death. *Id.* at 1062-66. The 1848 decision of the Massachusetts Supreme Court in *Carey* v. *Berkshire Railroad*, 55 Mass. (1 Cush.) 475, 48 Am. Dec. 616 (1848), applying the rule of *Baker* v. *Bolton* without explanation, was followed by acceptance of the general principle in both American and English courts. *Id.* at 1068. It has been suggested that one reason the Massachusetts Court took the position it did was that the Massachusetts General Assembly had "preempted the field" of death claims by punishing, under the criminal law, certain activities resulting in deaths. *Id.* at 1069-70. Whatever the reason, other jurisdictions followed suit and throughout the latter part of the nineteenth century, courts regularly denied death actions brought on common-law principles. *Id.* at 1071. Most of these cases arose in the context of litigants who did not qualify under the Death Acts which had long existed in some states for specialized situations and which proliferated after Lord Campbell's Act was enacted by Parliament in 1846.

Even before the adoption of Lord Campbell's Act, several states had passed legislation in the nature of survival actions for certain types of injuries—including death resulting from assault and battery. Malone, *American Fatal Accidents Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673. It was, however, the emergence of the steam railway in the middle nineteenth century which sparked the passage of death legislation throughout the country. From 1840 to 1887, 16 states made special provision for death resulting from railroad operations. *Id.* at 678. The first of these was Massachusetts in 1840. The act was penal in nature, a characteristic which still describes that state's law. While all laws dealt with the terrible toll taken by steamboats and locomotives as a separate category, some states sought from the beginning to encompass all types of situations resulting in death. Originally, Colorado counted itself among this group. *Id.* at 682. In 1872 Colorado enacted a general death statute similar to Lord Campbell's Act. In 1877, it inexplicably abandoned this approach and enacted a new statute patterned after Missouri's statute. Missouri, which became the prototype for several states, was of the "dual coverage" type, treating carriers differently from other defendants in death cases. Colorado still has this form of Death Act. *Id.* at 691. COLO. REV. STAT. § 13-21-201, providing a wrongful death action for in-

therefore, these Congressmen would not have thought that the "action at law" (or, for that matter, the "suit in equity, or other proper proceeding for redress") they were authorizing was a static concept. Representative Shellabarger introduced the bill (H.R. 320) which became the Ku Klux Act by emphasizing that it was "in aid of the preservation of human liberty and human rights," and that it was to be given "the largest latitude consistent with the words employed as are given statutes and constitutional provisions which are intended to protect and defend and give remedies for their wrongs."

---

juries sustained by any "locomotive, car or train of cars", is still a penal action in the Massachusetts mold, *Clint* v. *Stolworthy*, 144 Colo. 597, 357 P.2d 649 (1960), while § 13-21-202, providing a general wrongful death cause of action, is remedial. *Jones* v. *Hildebrant*, 550 P.2d at 344; *Clint* v. *Stolworthy*, *supra*.

Thus, while not all-encompassing, many states had Death Acts on the books prior to 1871 and many of these provided for survival of claims where the injury to the decedent arose out of an assault and battery. The Reconstruction Congress which drafted the Ku Klux Act of 1871 would have had reason to believe that the legislatures of the several states were aware of the harshness of the common law rule that death gave rise to no cause of action and, largely because of the alarming rate of deaths attributable to the steam engine, were doing something about it. This Court, under the general-common law reign of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1 (1842), had not yet settled the issue of the availability of wrongful-death actions in the absence of statutory authorization. In 1878, seven years after the enactment of § 1983, this Court held for the first time that death does not give rise to a cause of action. *Mobile Insurance Company* v. *Brame*, 95 U.S. 754 (1878). And it was not until 1880 that the Court held that federal courts had jurisdiction in diversity cases of suits brought under state wrongful death acts. *Dennick* v. *Central Railway Company of New Jersey*, 103 U.S. 11 (1880). In subsequent cases the Court held that, when federal courts considered claims for wrongful death, their incorporation of state wrongful death acts included any state-imposed limitations on liability. *See, e.g., Atchison, Topeka & Santa Fe Railway Company* v. *Sowers*, 213 U.S. 55, 66-67 (1909). This was a sensible rule in the context of diversity jurisdiction where no federal cause of action such as that created by § 1983 was involved. Obviously, different considerations govern here.

CONG. GLOBE, 42d Cong., 1st Sess., App. 68. There is no reason why he should not be taken at his word.

B. *In §1983 Death Cases The Courts Are Authorized, Both By General Principles Of Federal Remedial Law And By 42 U.S.C. § 1988, To Utilize State Wrongful-Death Statutes.*

It has been a common practice in this Court, in the lower federal courts, and in the state courts, when confronted with problems arising in federal subject-matter litigation which Congress has not specifically addressed, to resort to state law for the appropriate solution. As the Court stated in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943): "In our choice of the applicable federal rule we have occasionally selected state law." In some cases this is justified on the assumption "that Congress has consented to application of state law . . . . [a]nd in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947). But it is repeatedly insisted that "the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the [federal] legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling." *Id.*

The circumstances in which state law is looked to in federal causes of action are manifold. Of particular relevance to this case are the situations where death presents a potential barrier to continuation or maintenance of a suit involving federal rights. For example, in the context of antitrust litigation,[32] FELA cases,[33] and the

---

[32] *See, e.g., Rogers* v. *Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957).

[33] *See, e.g., Dellaripa* v. *New York, N.H. & H.R.R.*, 257 F.2d 733 (2d Cir. 1958).

exercise of admiralty and maritime jurisdiction,[34] the courts have looked to state survival and wrongful-death mechanisms, as a matter of federal law, and have utilized state law only when adequate to vindicate the federal interests involved. This practice has been so pervasive that it must be deemed to be a part of the fabric of federal law.

The practice just discussed has been specifically authorized by Congress in connection with both civil and criminal litigation under the Reconstruction-era civil rights acts. The legislative authorization in question is now codified in 42 U.S.C. § 1988.[35] It derives from § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27.[36] Section

---

[34] *See, e.g., Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342 (1936).

[35] 42 U.S.C. § 1988 provides in full:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Although § 1988 is by its terms directed to the federal courts, this Court has held that it has equal applicability to civil rights cases arising in the state courts. *Sullivan* v. *Little Hunting Park*, 396 U.S. 259 (1969).

[36] The original version of § 3 commenced by providing for federal jurisdiction "exclusively of the courts of the several states" with respect to criminal cases arising under the provisions of the 1866 Act, and by providing for the removal of cases from state to federal

1 of the Ku Klux Act, from which § 1983 derives, specifically provided that federal jurisdiction under that section would be exercised "with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of . . . [April 9, 1866]; and the other remedial laws of the United States which are in their nature applicable in such cases" (*see* note 5, *supra*).

By its express terms, § 1988 would seem to function no differently than the general federal adjudicative principles discussed above; it requires federal jurisdiction to be exercised, first, "in conformity with the laws of the United States, so far as such laws are suitable to carry

---

court in specified circumstances. It then contained the following language, which is now § 1988:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. In 1874 the revisers (*see generally Runyon* v. *McCrary*, 96 S. Ct. 2586, 2593 n.8 (1976)) made § 1988 applicable to all civil rights legislation. REV.STAT. § 722. By Pub.L.No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, Congress amended § 1988 by adding the Civil Rights Attorney's Fees Awards Act of 1976, to authorize awards of attorneys' fees in civil rights cases which theretofore were not covered by statutory fee-award provisions. Congress thereby made plain its view of § 1988 as a broad remedial statute designed to further, in all ways possible, the conduct of covered civil rights litigation.

the same into effect," and, second, "where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law," resort may be had to state law "so far as the same is not inconsistent with the Constitution and laws of the United States . . . ." [37] This Court has so construed it: "the section is intended to complement the various acts which . . . create federal causes of action for the violation of federal civil rights . . . . [because] inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action." *Moor* v. *County of Alameda*, 411 U.S. 693, 702 (1973). *See also Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

As we have previously pointed out (*see* note 20, *supra*, and accompanying text), the lower federal courts have frequently relied on § 1988, in whole or in part, to justify resort to state wrongful-death and survival procedures in § 1983 litigation. We have also shown that this practice finds firm support in legal history independently of § 1988, although the statute adds an extra measure of congressional support for this consistent approach to

[37] As one commentator has observed:

> In both *Pritchard* and *Brazier*, application of state survival statutes was simply a method of implementing the courts' underlying determination that effectuation of the congressional purpose required survival of actions under the Civil Rights Act. Although this approach led to satisfactory results in these cases, since state law provided for survival, it would prove abortive in jurisdictions with more restrictive statutes. It should be recognized that once the courts, even by a tenuous inference from statutory policy, have found that Congress intended actions to survive, the ultimate question has been answered; accordingly, that determination should be given effect as a matter of federal interstitial law rather than through a theory that depends for its utility on the content of state law.

Note, *Survival of Actions Brought Under Federal Statutes*, 63 COLUM. L. REV. 290, 297 (1963) (footnotes omitted); *see also id.* at 305; *Shaw* v. *Garrison*, *supra*.

§ 1983 death cases. It is especially appropriate for the courts to search out such suitable remedial devices when a violation of civil rights results in death, because, as Mr. Justice Harlan stated in another context:

> Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.

Moragne v. *States Marine Lines, Inc.*, *supra*, 398 U.S. at 381.

There is no room for doubt, in the light of this discussion, that there is a wrongful-death process available when appropriate in all § 1983 cases.[38] Whether the

---

[38] The Colorado Supreme Court's rulings (550 P.2d at 345) that there is no § 1983 wrongful-death remedy independent of state law and that petitioner cannot sue for the deprivation of her son's constitutional rights, are thus misplaced and essentially irrelevant. For, in all events, the issue which determines liability is whether the *decedent's* constitutional rights were violated. This same inquiry—whether there has been a breach of a legal duty owed to the decedent—is the dispositive one in nonconstitutional wrongful-death actions as well. Wrongful-death cases are unique in this respect, but that is merely reflective of the fact that death itself is an injury without equal. *Cf. Woodson* v. *North Carolina*, 96 S. Ct. 2978, 2992 (1976).

Some of the lower federal courts appear to have been troubled on occasion by the rule of *Bailey* v. *Patterson*, 369 U.S. 31 (1962), that one person may not sue for the deprivation of another's constitutional rights. But that concern is inapplicable to wrongful-death and survival actions under § 1983. *See, e.g., Smith* v. *Wickline*, 396 F.Supp. 555, 557 (W.D. Okla. 1975). The *Bailey* rule is one designed to insure the presence of an Art. III "case or controversy." There can be no question, in cases such as this one, that a "case or controversy" is extant. Wrongful-death cases are among the most traditional forms of litigation, and it has never been suggested, in the numerous survival and wrongful-death cases that have appeared before this Court, that the Court was without constitutional power to decide these common-place disputes.

§ 1983 death action relies on state legislation or is created through the application of general federal remedial principles, it is in all respects a *federal* cause of action.

We turn now to the issue relating to the proper measure of relief in § 1983 wrongful-death cases.

III. Restrictive State Damage Rules, Such As Colorado's "Net Pecuniary Loss" Limitation, Are Inapplicable When Incompatible With Interests Protected By § 1983.

The Colorado Supreme Court determined, in effect, that $1,500 was the proper measure of relief in a § 1983 action alleging that state officers killed petitioner's son in contravention of the Fourteenth Amendment. It is inconceivable to *amici* that such an unconscionable result can coexist with § 1983—unless the humane remedial purposes of that statute, which we have detailed previously, are to be negated. Consideration of those purposes is the starting point in determining the remedial scope of § 1983; because, as Mr. Justice Harlan observed in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196 n. 5.:

> It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

Consequently, "[s]tandards governing the granting of relief under § 1983 are to be developed by the federal [and state] courts in accordance with the purposes of the statute and as a matter of federal common law." *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 231 (separate opinion of Brennan, J.).

A. *Complete Justice And Deterrence of Unconstitutional Conduct Are The Twin Goals of § 1983.*

From the beginning, it has been the goal of American justice to ensure "the right of every individual to claim

the protection of the laws, whenever he receives an injury . . ."; to ensure that "the laws furnish . . . [a] remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 1 Cranch (U.S.) 137, 163 (1803) (Marshall, C.J.). Or, in Justice Cardozo's words: "Once let it be ascertained that the amount is determinable, and all that follows is an incident. . . . [O]nce a wrong is brought to light [, t]here can be no stopping after that until justice is done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 35-36 (1933). "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969). This is the basic compensatory thesis of American justice: "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury," *Wicker* v. *Hoppock*, 6 Wall. (U.S.) 94, 98 (1867), only recently reaffirmed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-19 (1975).

This central theme of complete justice is certainly the minimum remedial standard of § 1983. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 231-32 (1970) (Brennan, J., concurring in part and dissenting in part). But, as we have mentioned previously, and as the Ku Klux debates make clear, there is also a deterrence purpose underlying § 1983. A recurring theme in the 1871 debates was that a few substantial civil judgments and a few criminal convictions in each state would significantly advance the effort to bring to an end the lawless activities of the Ku Klux organizations. This Court has given effect to a similar purpose reflected in other civil rights

legislation, *cf. Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-18, and it is obvious that such a purpose is even more predominant in § 1983. This means, as the lower courts have long recognized,[39] that punitive damages are recoverable in appropriate circumstances. *See* Justice Brennan's separate opinion in *Adickes*, *supra*.

B. *The "Net Pecuniary Loss" Rule Negates The Purposes of § 1983.*

This case presents a particularly aggravated example of a limitation upon recovery for violation of federal constitutional rights which is in no way related to the purposes of § 1983 summarized above. The Colorado "net pecuniary loss" rule was applied to this case only by virtue of the Colorado Supreme Court's mistaken conclusion that its wrongful-death statute was identical to § 1983 ("adequacy in a death case of the state remedies to vindicate a civil rights violation," 550 P.2d at 345), and its misconstruction of 42 U.S.C. § 1988 (which we discuss in the following subsection).[40] Nowhere in its opinion did the court below attempt to justify the restriction upon petitioner's right to recover damages for the unlawful killing of her son by reference to the compensatory or deterrent purposes which underlie the Ku Klux Act. No such justification consistent with the Act can be formulated.

---

[39] *See, e.g., Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974); *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965). The United States District Court for the District of Colorado has recognized the appropriateness of punitive damages in cases alleging violations of § 1983. *Rhoads* v. *Horvat*, 270 F.Supp. 307 (D. Colo. 1967).

[40] In essence, the Colorado Supreme Court treated this action like a Federal Tort Claims Act case rather than a § 1983 case. *See Bartch* v. *United States*, 330 F.2d 466 (10th Cir. 1964).

The Colorado "net pecuniary loss" rule evidently reflects state policy with respect to the conditions under which the common law rule of abatement should be modified to promote adjustment of the burden of loss caused by negligence and other tortious activities. *See* note 31, *supra*. That limitation was clearly not designed to further the protection of federal constitutional interests. And, as is apparent from the unfortunate circumstances of this case, its application to § 1983 actions simply perpetrates injustice.

This Court has recently held that the "net pecuniary loss" rule is an unacceptable measure of damages in *Moragne*-type wrongful-death cases. *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974). If such restrictions on the complete-justice principle are inappropriate in admiralty, *a fortiori* they are unacceptable here. *See* Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DEN. L.J. 480, 489 (1966). Unquestionably, a person who is seriously injured by a police officer acting contrary to the Fourteenth Amendment would be able to recover damages many times greater than $1,500. But under the rule announced below, only token damages are recoverable when death results. Police officers are thus encouraged to kill (*cf.* note 24, *supra*). We do not see how a rule of damages which rewards police officers for killing citizens rather than just maiming them can survive side by side with the Fourteenth Amendment.

The scope of the damages remedy in § 1983 wrongful-death cases is to be worked out on a case-by-case basis, and all of the elements of recovery need not be decided in the instant case. Of course, the Court should hold that petitioner is at least entitled to recover for the elements of loss listed in *Sea-Land Services*, *supra*, and, for the reasons discussed in the preceding subsection, punitive damages should the facts warrant. *See Spence* v.

Staras, 507 F.2d 554 (7th Cir. 1974); *cf.* note 39, *supra*. Petitioner is plainly entitled to a measure of relief co-extensive with the constitutional injury and the federal policies to be served by § 1983—unless the law mandates the application of restrictive state rules, which we now discuss.

C. *Uniform Federal Rules of Recovery Are Required Even Where State Wrongful-Death Statutes Are Utilized.*

At the outset of this section of Argument we cited Mr. Justice Brennan's separate opinion in *Adickes* v. *S. H. Kress & Co.*, *supra*, for the proposition that uniform federal damages principles must be applied in § 1983 cases. As the Court of Appeals for the Third Circuit stated in the course of a well-considered opinion on the subject in *Basista* v. *Weir*, 340 F.2d 74, 86 (3d Cir. 1965) (footnote omitted):

> The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.

And as further stated by Mr. Justice Brennan in *Adickes*, *supra*, § 1983 "relief should not depend on the vagaries of the general common law but should be governed by uniform and effective federal standards."

398 U.S. at 232. These principles are especially relevant in the context of wrongful-death and survival statute, the protean nature of which is described in W. PROSSER, LAW OF TORTS §§ 126-27 (4th ed. 1971). Suffice it to say here that the statutes and judicial interpretations of the several states result in a crazy-quilt of rules relating to recoverable damages.

In contexts no less compelling than those present here, the Court has fashioned uniform rules affecting the relief available under § 1983. The Court has done this in all of its absolute and qualified-immunity decisions from *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), through *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). *See generally* Theis, *Shaw* v. *Garrison: Some Observations On 42 U.S.C. § 1988 And Federal Common Law*, 36 LA. L. REV. 681, 685 (1976). There is, therefore, no reason deriving from general principles of federal law why § 1983 relief should be circumscribed by state principles of damages designed primarily to deal with entirely different policies and interests.

Furthermore, there is plainly nothing in 42 U.S.C. § 1988 that prescribes the use of inhospitable state remedial rules in § 1983 cases.[41] In Argument IIB, *supra*, we observed that the policy of § 1988 is neither more nor less than the general non-statutory federal practice of resorting to state law in aid of but not in derogation

---

[41] On page 7 of their brief opposing the grant of a writ of certiorari, the respondents state that, "The Colorado Supreme Court followed the *unanimous precedent* of the federal courts in holding that the Colorado *measure of damages* for wrongful death would apply in a Civil Rights action based upon a wrongful death." (Emphasis added). With the exception of *James* v. *Murphy*, 392 F. Supp. 641 (M.D.Ala. 1975), the cases cited in text (pp. 4-7) do not support this conclusion. Nor does it follow that, just because a federal court would use § 1988 to incorporate state wrongful-death statutes, damage limitations would apply as well. *See* cases cited in Brief of Respondents, n. 1. Since virtually all of these cases arose on motions to dismiss, the damage issue was not addressed.

of federal rights and obligations.[42] This Court's authoritative construction of § 1988 is "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Sullivan* v. *Little Hunting Park, supra*, 396 U.S. at 240. Accordingly, § 1988 also requires the application of federal remedial rules whenever state law falters.

Finally, we think Mr. Justice Brennan's dissenting opinion in *The Tungus, supra*, which we interpret in light of *Moragne* as now being sound law,[43] is dispositive of the very point at issue here—i.e., that the process of state wrongful-death legislation may be resorted to in litigation involving the breach of federally-imposed duties, but that uniform federal standards of relief must be

[42] The Rules of Decision Act, 28 U.S.C. § 1652, has no application to this case in light of the supervening purpose of § 1983, which as we demonstrate in text "requires" a uniform federal rule of damages. *Cf. Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (subject matter "peculiarly one that calls for uniform law"); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969) ("As we read Sec. 1988 . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes . . . . [T]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."). *See Moor* v. *County of Alameda, supra*, 411 U.S. at 703; *Shaw* v. *Garrison, supra*, 545 F.2d at 983-84; *Brown* v. *Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971). *See generally*, Theis, *Shaw* v. *Garrison: Some Observations On 42 U.S.C. §1988 and Federal Common Law*, 36 LA. L. REV. 681, 684-88 (1976); Niles, *supra* n. 23, 45 TEX. L. REV. at 1023-25; Page, *supra* n. 23, 43 DENVER L.J. at 489. To hold otherwise in this case would require the overruling of a long line of decisions in which uniform federal law was enunciated in litigation affecting matters of special federal concern without any reference to or discussion of the Rules of Decision Act. *See* cases cited at pp. 48-49, *infra*.

[43] As we follow the law from *The Harrisburg*, 119 U.S. 199 (1886), through *The Tungus* to *Moragne's* overruling of *The Harrisburg*, upon which *The Tungus* relied, Justice Brennan's dissent in *The Tungus* is now the law; and it would have been the law in 1959 had not the majority in *The Tungus* felt bound by *The Harrisburg*.

applied in such cases. In particular, we note Justice Brennan's analysis (358 U.S. at 604-05) of several state court maritime wrongful-death decisions, one of which held: "[W]e must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts." *Riley* v. *Agwilines, Inc.*, 296 N.Y. 402, 405-06, 73 N.E. 2d 718, 719 (1947).[44] Justice Brennan's well-documented conclusion in the admiralty context is fully applicable to the circumstances of the case at bar: "While there is ground for local variation on nonessential matters, on the essentials the admiralty may look to uniform features in these statutes rather than the diverse." 358 U.S. at 609. Since the damage rules of state wrongful-death and survival statutes are "diverse" (*see, e.g., Sea-Land Services, supra*),[45] they should be subordinated to uniform federal rules which serve the broad purposes of § 1983.

[44] State courts have applied federal law in § 1983 cases and many other contexts involving violations of federal rights. *See, e.g., Dudley* v. *Bell*, 50 Mich. App. 678, 213 N.W. 2d 805 (1973); *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y.2d 576, 579-85, 255 N.E.2d 774, 775-79, 307 N.Y.S.2d 660, 662-66, *cert. denied*, 398 U.S. 939 (1970); *Basham* v. *Smith*, 149 Tex. 297, 233 S.W. 2d 297, 300-302 (1946).

[45] Colorado's Death Act is generally patterned after Lord Campbell's Act. This means that a property interest is created in certain designated survivors for the "net pecuniary loss" to them resulting from his death. Colorado's survival statute permits the recovery of punitive damages and penalties resulting from injuries unless the *defendant* dies. Apparently, these are unavailable if the plaintiff dies instantly. The statute provides that damages recoverable after the plaintiff dies are limited to loss of earnings and expenses incurred prior to death. No damages are permitted for pain and suffering or disfigurement nor prospective profits or earnings after death. Neither of these statutes fulfills the purpose of the Civil Rights Act to act as a deterrent to official misconduct as well as to afford compensatory relief.

In sum, the federal cause of action in cases such as this one arises out of the deprivation of life without due process of law. The purpose served by state wrongful-death and survival statutes is to overcome the draconian common-law rule that causes of action abate upon the death of either party. Once that purpose has been accomplished, there is no reason why a federal court should be constricted by limitations on damages adopted by the state as part of its general tort law.

IV. If the State Wrongful-Death Act Must Be Applied in its Entirety, Then This Court Should Reject the State Law Approach Altogether and Create a Federal Common Law of Survival and Wrongful Death Under § 1983.

We have argued that the Court should apply a federal rule of damages in implementing the principles established by the state wrongful-death statute. However, if the Court holds that a state statute must be applied *in toto*, then *amici* believe it is incumbent upon the Court to create a federal common law of wrongful death under § 1983. The controlling principles are outlined in Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975):

> Since judicial power to create federal common law admittedly exists where authorized by statute, concern usually centers upon the appropriate criteria for determining whether federal common law is to be fashioned when a congressional determination to displace state law is a possible, but not unmistakeable construction. Although the cases are somewhat ad hoc—reflecting a crazy-quilt pattern of statutory, constitutional, and pragmatic considerations—the analysis is usually framed in terms of whether the congressional purpose embodied in, or indicated by, a statute requires state law to be subordinated. Con-

> gressional purpose is divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law. Where the inquiry indicates that application of state law would frustrate congressional policy, state law is subordinated. This is the usual mode of preemption analysis. [footnotes omitted].

The necessity for federal courts to formulate remedies is founded "upon the presence of a federal interest coupled with the reasons which undermine the presumption that state law should apply." Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1525 (1969). If a court determines that the general presumption in favor of state law applies,

> It [still] must inquire whether the need exists for federal law to further federal policies or foster uniformity. If either circumstance is present, it must weigh the benefits promised by local solution against the need for a national rule.

Id. at 1531. With respect to uniformity, plainly federal law is created for the whole nation. "Hence, there is an interest in having it mean the same thing in each state." *Id.* at 1529. *See Jerome* v. *United States*, 318 U.S. 101, 104 (1959).

With respect to the furtherance of federal policy, the same reasons that led this Court in *Moragne* v. *States Marine Lines, Inc.*, *supra*, to abandon the reliance on state wrongful-death statutes in admiralty law are present in this case. As the Court pointed out in *Moragne*, the legislatures, both here and in England, began to evidence *unanimous disapproval* of the abatement of death

actions.[46] As the Court said in *Moragne* (398 U.S. at 390):

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

During the period in which the doctrine of *The Harrisburg*, *supra*, held sway, it was understood that statutes of the coastal states could be used to fill the void for death on the high seas if the state so intended. This

---

[46] "Today we should be thinking of the death statutes as part of the general law." Pound, *Comment on State Death Statutes—Application to Death in Admiralty*, 13 NACCA L.J. 188, 189 (1954), quoted in *Moragne*, *supra*. *See also Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 350-51 (1936), where Mr. Justice Cardozo said:

> Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day. [Footnote omitted]

was without the benefit of any statute similar to § 1988. In any event, persons injured within the territorial limits of the states could utilize state wrongful death statutes if these statutes were interpreted to include unseaworthiness claims. That approximates the situation now with respect to death actions under § 1983.

Thus, a claim for a violation of constitutional rights may survive or abate, or result recovery for net pecuniary loss, compensatory or punitive damages, depending upon where the violation occurs. Furthermore, the present situation creates the anomaly that if a person is merely injured by official misconduct, he can bring a civil rights action and seek compensatory and punitive damages and, at the same time, maintain an action for assault and battery under state law. *See* note 23, *supra*. But if he dies, his damages under § 1983 are severely contracted by the state wrongful-death statute. This defies all logic and defies the notion of uniformity for redress of deprivations of constitutional rights. There is simply no substantial justification for the haphazard pattern which results when state laws are pressed into service to afford a remedy when a violation of constitutional rights results in death. In every other kind of constitutional injury, the federal courts presently apply a federal common law of damages. A different rule applicable where injury results in death is not sustainable.

Accordingly, the issue under discussion here is whether federal law, in its common-law dimension, has sufficient flexibility to adapt to "the result dictated by elementary principles in the law of remedies." *Moragne* v. *States Marine Lines, Inc.*, *supra*, 398 U.S. at 381. Two decades of litigation in the lower federal courts over this precise issue in § 1983 death cases has produced an affirmative answer. That answer is confirmed by numerous decisions of this Court, both in general and in analogous circumstances. Although this Court has been required

to fashion federal substantive and remedial principles less frequently since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) than it was during the regime of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1 (1842), it has nevertheless confronted such tasks with considerable regularity.[47] With particular relevance to the instant case, Mr. Justice Harlan's opinion for a unanimous Court in *Moragne* v. *States Marine Lines, Inc., supra*, and Mr. Justice Brennan's dissenting opinion (joined by three other members of the Court) in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 597-612 (1959), stand at the head of a large class of cases, coming here from both the state courts and the lower federal courts, in which the Court has developed uniform substantive and remedial principles of federal law. *See, e.g., Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (original jurisdiction); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 338 (1971); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Farmers Educ. Cooperative Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1945) (Frankfurter, J.); *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945) (Black, J.); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (Stone, C.J.); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943) (Douglas, J.); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) (Stone, C.J.); *Jackson County* v. *United States*, 308 U.S. 343 (1939) (Frankfurter, J.).

[47] As early as 1935 it was established that "if a claim based upon national law is asserted, whether in a state or a federal court, the federal statutes or the rules of decision of the federal courts must be looked to for a determination of the measure of damages." C. McCORMICK, HANDBOOK ON DAMAGES § 3, p. 11 (1935). While this was written when *Swift* v. *Tyson, supra*, was still the law, the existence of a federal common law in nondiversity cases is well documented. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964). See P. BATOR, P. MISHKIN, D. SHAPIRO and H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 756-832 (2d ed. 1973).

These and many other cases do not result from the fear that "the judicial hand would stiffen in mortmain if it had no part in the work of creation." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313 (1947) (Rutledge, J.). They result, rather, from the adjudicative obligations of the federal courts with respect to matters "distinctively federal in character." *Id.* at 305. And as we have shown above, no class of cases can be more uniquely federal than § 1983-Fourteenth Amendment actions. *See also Adickes* v. *S. H. Kress & Co., supra*, 398 U.S. at 231-34 (Brennan, J., concurring in part and dissenting in part). The power and the authority exist for this Court to fashion a § 1983 wrongful-death remedy without regard to other state or federal legislation; the foregoing cases establish the propriety and, indeed, the obligation.

The exercise of that power in this case is required both by the interest in achieving uniformity in the redress of federally created rights and by the substantial interest in seeing that those rights are *effectively* redressed.

CONCLUSION

For the foregoing reasons, *amici* submit that the judgment below should be reversed and the case remanded for trial of petitioner's § 1983 claims in accordance with federal remedial principles responsive to the federal policies and interests at stake.

Respectfully submitted,

ROBERT A. MURPHY
RICHARD S. KOHN
NORMAN J. CHACHKIN
WILLIAM E. CALDWELL
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

VILMA S. MARTINEZ
MORRIS J. BALLER
Mexican American Legal
Defense & Educational
Fund, Inc.
145 Ninth Street
San Francisco, California 94103

NATHANIEL R. JONES
General Counsel, N.A.A.C.P.
1790 Broadway
New York, New York 10019

Attorneys for *Amici Curiae*

Of counsel:

AMITAI SCHWARTZ
Northern California
Police Practices Project
814 Mission Street
San Francisco, California 94103